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No. 99-

IN THE

Supreme Court of the United States

JONATHAN D. MAURO,

Petitioner,

v.

JOSEPH M. ARPAIO and MARICOPA COUNTY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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111 pp

QUESTIONS PRESENTED

1. Do the First and Fourteenth Amendments permit a county jail system to impose a total ban, with no exceptions of any kind, on pretrial detainees possessing depictions of frontal nudity—thus prohibiting and punishing the possession even of medical, educational, and artistic materials that include nude figures?

2. Do the First and Fourteenth Amendments permit a county jail system to impose a total ban on pretrial detainees possessing depictions of frontal nudity without any individualized consideration of inmates' requests for materials that contain such depictions?

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IN THE

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JONATHAN D. MAURO,

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JOSEPH M. ARPAIO AND MARICOPA COUNTY,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioner Jonathan D. Mauro respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case August 17, 1999.

OPINIONS AND ORDERS BELOW

The order of the United States District Court for the District of Arizona granting summary judgment for respondents is unreported and is reproduced in the Appendix at A. 52a. The opinion of the three-judge Ninth Circuit panel reversing the District Court is reported at 147 F.3d 1137 and is reproduced at A. 35a. The order of the Ninth Circuit withdrawing the panel opinion and directing that the case be reheard by the *en banc* court is reported at 162 F.3d 547 and is reproduced at A. 34a. The opinion of the *en banc* Ninth Circuit court affirming summary judgment is reported at 188 F.3d 1054 and is reproduced at A. 1a.

JURISDICTION

The judgment of the *en banc* Ninth Circuit court was entered August 17, 1999. On October 20, 1999, Justice O'Connor extended the time within which to file a petition for a writ of certiorari in this case to and including December 15, 1999. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND REGULATION INVOLVED

The First and Fourteenth Amendments to the United States Constitution are reproduced at A. 71a. Documents setting forth the Maricopa County Sheriff's Office policy regarding the possession of materials containing depictions of frontal nudity are reproduced at A. 72a and 73a.

STATEMENT

A. The County Policy Prohibiting and Punishing Possession by Inmates of Depictions of Frontal Nudity.

The Maricopa County Sheriff's Office ("MCSO") runs a jail system in and around Phoenix, Arizona that is described as one of the nation's largest, "housing 6500 inmates at any given time." A. 2a.[1] The jails of Maricopa County ("the County") "house[] a mix of pretrial detainees and convicted inmates." A. 6a n.1.

In August 1993, the MCSO implemented a new policy at all the County jails, prohibiting inmates from possessing "sexually explicit material." A. 72a. The policy defines "sexually explicit materials" as "materials that show frontal nudity," male or female. A. 73a; E.R. 165. Under the

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[1] "A." refers to the Appendix to this petition. "E.R." refers to the Excerpts of Record filed by appellant in the Court of Appeals.

policy, if any inmate is found with "photographs, drawings, . . . magazines [or] pictorials that show frontal nudity," he is "written up on a Disciplinary Action Report" and his materials are "confiscated as Administrative Contraband, and destroyed." A. 73a-74a. Any such materials sent from outside the jail are returned as unauthorized mail. *Id.* Jail employees, pursuant to the policy, on numerous occasions have rejected incoming mail, and confiscated materials in inmates' cells, because they contained depictions of frontal nudity. E.R. 173.

The MCSO policy's ban is total, with no exceptions for nudity depicted in connection with medical, educational, artistic, or any other types of work. A. 9a n.5, 40a, 60a-61a. It prohibits both incoming publications and inmates' own artwork. A. 73a. There is no individualized review—by the Sheriff, other high-level jail administrators, or anyone—of inmate requests for expressive materials that contain nudity. A. 68a-69a. As summed up by the *en banc* Ninth Circuit court: "Under the policy, *all* materials containing frontal nudity are prohibited. Thus, jail employees must simply determine whether the material in question contains frontal nudity; if it does, it is prohibited under the policy." A. 9a n.5 (emphasis in original).

The policy, according to a contemporaneous internal sheriff's office memorandum, was implemented: (i) in response to "several complaints from female Detention Officers" regarding inmates who would display nude pin-ups from men's magazines "when the females were present, and then make inappropriate comments to the females"; and (ii) because "[o]n any given day 10% to 20% of inmates in our custody are here on charges of sexual assault, sexual abuse, child molestation or sexual misconduct and we feel that morally we should not provide this material to those people," E.R. 80-81, which the County later described as an interest in "rehabilitation" of inmates facing charges on

sex-related offenses. A. 53a. At his deposition, the deputy chief of the MCSO custody bureau advanced a third justification for the policy: (iii) preventing inmate fights that could occur if anatomical comparisons were drawn between nude pin-ups and other inmates' wives or girlfriends. *See* Appellees' Answering Brief at 19 n.8.

The petitioner, Jonathan D. Mauro, was incarcerated at the County's Madison Street Jail in Phoenix for roughly two years awaiting trial on charges of fraudulent schemes and artifices. Held at the jail solely as a pretrial detainee, Mauro had not been charged with any offense or jail infraction involving sexual harassment, sexual misconduct, or violence. In October 1995, he requested that a subscription to *Playboy* magazine be directed to him at the jail. E.R. 143. Jail administrators rejected his request, citing the policy's total ban on materials containing nudity. E.R. 51. In November 1995, after exhausting his administrative appeals within the jail system, E.R. 51-54, Mauro brought a lawsuit under 42 U.S.C. § 1983 against the County and the Sheriff for deprivation of his First and Fourteenth Amendment rights, seeking compensatory damages and injunctive relief.[2]

B. The *Turner/Thornburgh* Standard.

The courts below recognized that determining the constitutionality of the MCSO policy required analysis and application of two Supreme Court decisions, *Turner v. Safley*, 482 U.S. 78 (1987), and *Thornburgh v. Abbott*, 490 U.S. 401 (1989).

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[2] *See* First Am. Compl. at 7, *Mauro v. Arpaio*, No. CIV 95-2729 PHX RCB (D. Ariz. Feb. 8, 1996). Mauro is no longer a pretrial detainee at the Madison Street Jail. He is now incarcerated at the Arizona State Prison Complex in Florence. Because of Mauro's claim for compensatory damages mootness is not an issue, however. *See Board of Pardons v. Allen*, 482 U.S. 369, 370 n.1 (1987).

In *Turner*, this Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests," 482 U.S. at 89, and set out a four-part test for judging the constitutionality of such regulations, *see id.* at 89-91. Although often described as a test with four "factors," *see, e.g.*, A. 5a, the first prong of the *Turner* test in fact contains three separate baseline requirements that a jail or prison regulation must satisfy in order to be valid: Under this first prong, "the governmental objective" underlying the regulation "*must* be a legitimate and neutral one"; "there *must* be a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"; and "a regulation *cannot* be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Turner*, 482 U.S. at 89-90 (quotation omitted; emphasis added).

The second through fourth prongs of the test are indeed factors "that are relevant to, and that serve to channel, the reasonableness inquiry." *Thornburgh*, 490 U.S. at 414. They are whether: "there are alternative means of exercising the right that remain open to prison inmates," *Turner* 482 U.S. at 90 (second prong); "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally," *id.* (third prong); and whether "obvious, easy alternatives" to the regulation show that it is an 'exaggerated response' to prison concerns," *id.* at 90-91 (fourth prong).

In *Thornburgh*, this Court applied the *Turner* test to consider a free-speech challenge to prison regulations that banned incoming publications based on their subject matter. 490 U.S. at 414. Rejecting a facial challenge to federal Bureau of Prisons regulations that gave wardens the discretion

to reject a particular incoming publication "'if it is determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity'" at a particular institution at a particular time, *id.* at 404-05 (quoting 28 C.F.R. § 540.71(b) (1988)), the Court nevertheless ordered the case remanded for "a determination of the validity of the regulations as applied to each of the 46 publications" at issue in the case. *Id.* at 404. In upholding the facial validity of the BOP regulations, the Court relied on, *inter alia*, "the individualized nature of the determinations required by the regulation," and that "the regulations expressly reject certain shortcuts"—such as creating a list of excluded publications or delegating to lower-level employees the authority to reject publications based on their subject matter—"that would lead to needless exclusions." *Id.* at 416-17. The Court endorsed the discretion that the regulations granted to wardens, cautioning that "[a]ny attempt to achieve greater consistency" in the application of the rules "by broader exclusions might itself run afoul of the second *Turner* factor, *i.e.*, the presence or absence of alternative means of exercising the right in question." *Id.* at 417 n.15 (quotation omitted).

C. The Decisions Below.

1. The District Court Ruling.

The parties made cross-motions for summary judgment. The record demonstrated without dispute that the prohibition on *all* materials containing depictions of nudity, including educational, artistic, and other nonprurient depictions of nudity, was intentional. The County confirmed that the policy had no exceptions, and that nudity in such magazines as *Art & Auction* and *National Geographic*, and photographs of works of art such as Michelangelo's *David* and Renoir's *The Bathers*, would be illegal contraband under the MCSO policy. *See, e.g.*, E.R. 135, 176.

The County presented testimony that prior to the policy's implementation, female prison guards had experienced sexual harassment from certain inmates who had brandished nude pin-ups from men's magazines while making inappropriate comments, such as comparing the guards' anatomy with that of the pin-ups. The guards also reported on incidents in which inmates had masturbated in their presence while displaying the pin-ups. E.R. 72.

The District Court noted that the County's evidence regarding the other asserted rationales for the policy—the alleged need to ban nude images in order to "rehabilitate" those inmates who are facing sex-crime charges, and to prevent fights among inmates over nude pictures—was "sparse." A. 59a n.6.[3] The District Court observed, moreover, that none of the County's evidence in support of the policy concerned any misconduct involving materials containing educational, artistic, or other nonprurient depictions of nudity. A. 61a. Nor was there any evidence that depictions of male nudity had ever been misused by or caused a fight between inmates.

The District Court nevertheless granted summary judgment for the County, holding under the first *Turner* prong that neither "an *exact* link between the excluded materials and government interests" nor "extensive factual proof of the link between the regulation and the government's interests" was required, A. 61a (emphasis in original), and finding that the other prongs of the *Turner* test favored the County as well. A. 62a-68a.

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[3] The *en banc* court later observed that the rehabilitation rationale was in any event "not a legitimate goal to the extent that the jail is attempting to impose rehabilitation on the pretrial detainees housed at the jail." A. 6a n.1. *See also McGinnis v. Royster*, 410 U.S. 263, 273 (1973) ("[I]t would hardly be appropriate for the State to undertake in the pretrial detention period programs to rehabilitate a man still clothed with a presumption of innocence").

2. The Ruling of the Three-Judge Panel.

A unanimous three-judge panel of the Ninth Circuit reversed. The panel, observing that the County's ban on "all depictions of frontal nudity" with no exceptions was "a prohibition that went far beyond any sanctioned by this court, or any other," A. 47a, found the policy to be "substantially overbroad" on its face and invalid under the First Amendment. A. 40a. Noting that the First Amendment protects nonobscene depictions of nudity, the panel observed that "[a] wide variety of magazines and materials contain some frontal nudity, and pursuant to the regulation, inmates would be prevented from having any photograph, drawing or graphic that depicted frontal nudity," including "such magazines as *National Geographic*, medical journals, artistic works, and countless other materials." *Id.*

Applying the *Turner* test's first prong, the panel noted that the County had "offer[ed] no evidence of past incidents of violence or harassment" where scientific, artistic, or other nonprurient materials depicting nudity were involved. A. 45a. It held the policy unconstitutional, therefore, because "[t]he County has not carried its burden to show that such a far reaching prohibition is 'reasonably related' to legitimate penological interests. It offers no proof or reasoned explanation." A. 47a.[4]

Relying on this Court's *Thornburgh* decision for "useful guidance," the panel held that the policy failed *Turner*'s second prong as well because "in direct contradiction of the

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[4] As an example of the County's failure to supply a reasoned basis for the extraordinary breadth of the policy's ban on nude images, the panel quoted the deputy chief's testimony that a photograph of Michelangelo's *Crucifixion of the Convent of Santo Spirito* would be illegal contraband under the policy because it was conceivable to him that an "atheist" could incite a fight with a "devout Christian" regarding "the size of the genitals" of the figure in the painting. A. 46a-47a.

Supreme Court's cautionary language in *Thornburgh*, Maricopa County has enacted a regulation that sweeps too broadly, indiscriminately eliminating large categories of materials without individualized consideration." A. 48a-49a. *See also* A. 48a ("There is no issue by issue determination of whether a particular depiction of nudity might cause the unwanted consequences the prison seeks to avoid, nor does the warden have a nondelegable duty to make such an individualized determination"). Finding it unnecessary to examine the final two *Turner* prongs closely, the panel held the policy unconstitutional and reversed the grant of summary judgment in favor of the County. A. 49a.

3. The Ruling of the *En Banc* Court.

After a "vote of a majority of nonrecused regular active judges" of the Ninth Circuit, the panel's opinion was withdrawn and, pursuant to Ninth Circuit Rule 35-3, the case was ordered heard by an eleven-judge *en banc* court. A. 34a. By a 7-4 vote, the *en banc* court upheld the constitutionality of the policy and affirmed the District Court's grant of summary judgment. The four judges in the minority wrote three separate dissenting opinions.

The majority opinion, emphasizing the "deferential standard of review" required in prison litigation, A. 4a, proceeded to limit its scrutiny of the policy under *Turner* in two significant, and novel, ways. First, the majority refused to consider under *Turner*'s first prong whether the County's no-nudity, no-exceptions policy—although certainly *effective* in keeping nude pin-ups out of the hands of those inmates who might have used them to harass female guards—needlessly swept within its reach expressive materials whose content was far removed from the harassment problem. "The *only* question that we must answer," the majority held, is "whether the defendants might reasonably have thought that the policy would *advance* its interests." A. 7a-8a (emphasis added). Second, the majority refused to

weigh *Turner*'s fourth prong—"whether the policy is an 'exaggerated response' to the jail's concerns"—at all unless the inmate *first* carried his "burden" to propose specific alternatives to the policy that the court considered to be sufficiently obvious and inexpensive. A.5a, 12a-13a, 15a. The majority also held that *Thornburgh* did not prohibit a broad and inflexible subject-matter ban. *See* A. 8a n.4, 9a n.5.

Limiting its scrutiny in this manner, the majority found that the MCSO policy did not violate inmates' free-speech rights because "all that is required is that there be a 'rational' connection between the policy and the jail's legitimate objectives." A. 9a. Because it found that none of the alternatives that Mauro had proposed in the District Court was sufficiently obvious and cost-free, the majority refused to consider whether the jail's total ban on even educational and artistic depictions of nudity was needlessly overbroad and therefore an "exaggerated response" to such problems as harassment of female guards. A. 15a.

4. The Dissenting Opinions.

In the first of three opinions by the four dissenting judges, Judge Schroeder warned that "the majority puts us in conflict with the Supreme Court's teaching in *Thornburgh v. Abbott*, 490 U.S. 401, 417 n.15 [] (1989), that prisons should eschew prohibition of broad categories of publications," and erroneously endorses a policy that "fails the primary test articulated by the Supreme Court in *Turner v. Safley*." A. 16a. In addition, because "[i]t leaves no alternative means for inmates to exercise their First Amendment rights to illustrated educational, religious, or other materials that may contain nude figures but are unrelated to any of the penological concerns underlying the regulation," the MCSO policy "flunks the second *Turner* test as well." *Id.*

Judge Fletcher noted in a separate opinion the "astonishingly broad range of material" banned by the policy, and

rejected the notion "that the First Amendment does not protect the right of, for example, a nonviolent, nonharassing pretrial detainee to pursue his general equivalency diploma by reading a Western Civilization textbook containing a chapter on the art of the Renaissance." A. 22a.

Judge Kleinfeld, the final dissenter, cautioned that "[t]he liberty at issue, a First Amendment liberty to read . . .[,] is a substantial one, especially where it involves people whom the state holds as prisoner but who have not yet been convicted of crimes." A. 30a. Pursuant to *Bell v. Wolfish*, 441 U.S. 520 (1979), Judge Kleinfeld would have reversed the grant of summary judgment, pointing out, *inter alia*, that although "some prisoners did disgusting things using sexually oriented magazines as props, to harass female guards, ... [s]o far as the record indicates, the plaintiff never did. The harassment by other prisoners does not establish that banning the magazines is not excessive relative to the goal of maintaining order." A. 29a.[5] Because "[t]he harassment . . . is caused by display of the magazines in a purposely harassing manner, but the regulation at issue goes to their receipt and possession even by those who do not engage in such conduct, such as plaintiff," Judge Kleinfeld would have found that a jury issue existed on the issue of excessiveness. A. 33a.

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[5] Judge Kleinfeld stated that the majority should have used *Bell* as the governing standard because it, unlike *Turner*, specifically addresses the rights of pretrial detainees. A. 23a-24a. The *Bell* standard is in certain respects quite similar to *Turner*'s, asking, *inter alia*, whether a regulation affecting pretrial detainees is "reasonably related to a legitimate governmental objective" or whether "officials have exaggerated their response" to the problems addressed by the regulation. 441 U.S. at 539, 540 n.23. Indeed, this Court in *Turner* expressly drew from *Bell* in crafting the reasonableness test. *See* 482 U.S. at 87.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit, sitting *en banc*, has upheld a jail regulation that inflexibly "bans publications ranging from the *National Geographic* to art books displaying Michelangelo's *David*." A. 15a-16a (Schroeder, J., dissenting). "No other court has upheld such a broad intrusion into an inmate's First Amendment rights." *Id.* at A17a.

Indeed, the possibility that a sister circuit reviewing new federal prison regulations recently called "bizarre," and "all but impossible to believe"—that "the Swimsuit Edition and Victoria's Secret pass muster while Michelangelo's David or concentration camp pictures fail," *Amatel v. Reno*, 156 F.3d 192, 202 (D.C. Cir. 1998), *cert. denied*, 119 S. Ct. 2392 (1999)—is the very result required by the MCSO policy that the Ninth Circuit has upheld.

As a subsequent Ninth Circuit panel observed, the *en banc* court departed from precedent in reaching this result: "In very clear and broad language," the panel advised, the *Mauro* decision "*dramatically diminishes the level of scrutiny* that courts ordinarily are to apply to the decisions of prison administrators." *Frost v. Symington*, 1999 WL 1054897, at *7 (9th Cir. Nov. 23, 1999) (emphasis added).

In both *Turner* and *Thornburgh*, Justice Stevens cautioned that the principle of deference to prison administrators, key to the "reasonableness" standard, not be taken so far as to "'permit disregard for inmates' constitutional rights whenever the imagination of the warden produces a plausible security concern and a deferential trial court is able to discern a logical connection between that concern and the challenged regulation.'" *Thornburgh*, 490 U.S. at 434 n.18 (Stevens, J., concurring in part and dissenting in part) (quoting *Turner*, 482 U.S. at 100-01 (Stevens, J., concurring in part and dissenting in part)). As Justice Stevens noted, since there also "'is a logical connection between

prison discipline and the use of bullwhips on prisoners,'" *id.*, reducing court scrutiny to this bare minimum would ignore that, however limited, inmates do retain First Amendment rights, which are fundamental and merit protection, *see Turner*, 482 U.S. at 84.

By rejecting the safeguards set forth in *Turner* and *Thornburgh* that "channel[] the reasonableness inquiry," 490 U.S. at 414, the *en banc* Ninth Circuit court has diminished the level of scrutiny of the actions of prison administrators in precisely the manner that Justice Stevens warned courts might. Moreover, its modification of the *Turner* test to uphold a cavalierly overbroad infringement of inmates' free-speech rights undermines confidence in this Court's promise in *Thornburgh* that "a reasonableness standard is not toothless." *Id.* (quotation omitted). This Court should grant certiorari, as it has in the past, to review "important issues relevant to general prison administration" that are raised in connection with constitutional challenges to prison rules.[6]

I. THE *EN BANC* COURT UPHELD A BAN ON EXPRESSIVE MATERIALS THAT IS "OF UNPRECEDENTED BREADTH."

The First Amendment without doubt protects expressive materials that contain nudity. In general, "[v]isual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection." *Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997); *see also Kaplan*

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[6] *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 459 (1989). *See also O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987); *Block v. Rutherford*, 468 U.S. 576, 582 (1984); *Rhodes v. Chapman*, 452 U.S. 337, 344 (1981); *Wolff v. McDonnell*; 418 U.S. 539, 542 (1974).

v. California, 413 U.S. 115, 119 (1973). In particular, visual depictions of the nude human figure as an art form date back to antiquity, *see* K. Clark, *The Nude: A Study in Ideal Form* 4 (1956), and are recognized as protected by the First Amendment, *see Osborne v. Ohio*, 495 U.S. 103, 112 (1990); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 66 (1981). *Cf. Reno v. ACLU*, 521 U.S. 844, 878 (1997) (noting as example of Communications Decency Act's overbreadth that "[it] may also extend to . . . artistic images that include nude subjects").

Accordingly, *all* the prison and jail rules regulating sexually explicit materials that courts until now have upheld have been significantly narrower than the MCSO policy and otherwise have included safeguards to protect expressive materials "that may contain nude figures but are unrelated to the penological concerns underlying the regulation." A. 16a (Schroeder, J., dissenting).[7]

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[7] *See, e.g., Thornburgh*, 490 U.S. at 405 & n.6 (federal regulations prohibiting material containing sexually explicit depictions of homosexuality and sado-masochism, but providing exceptions for material that "has scholarly, or general social or literary, value" or otherwise is found by the warden not to pose a threat at the local institution); *Giano v. Senkowski*, 54 F.3d 1050,1051-52 (2d Cir. 1995) (policy banning nude photographs of inmates' wives or girlfriends, but permitting commercially produced magazines such as *Playboy*); *Dawson v. Scurr*, 986 F.2d 257, 261 (8th Cir. 1993) (rules permitting inmates "to keep many sexually explicit materials in their cells" and "merely restrict[ing] the time and place of access to *certain* sexually explicit materials") (emphasis in original), *cert. denied*, 520 U.S. 1251 (1997); *Thompson v. Patteson*, 985 F.2d 202, 204 (5th Cir. 1993) (regulations prohibiting sexually explicit publications only when "a specific factual determination has been made that the publication is detrimental to prisoner[s'] rehabilitation because it would encourage deviate criminal sexual behavior") (quotation omitted). *See also Waterman v. Farmer*, 183 F.3d 208, 210, 211 (3d Cir. 1999) (rules, applicable to inmates at a prison for "repetitive and compulsive" sex offenders, prohibiting "sexually oriented and obscene materials" but permitting materials containing

The MCSO policy, on the other hand—prohibiting "material ranging from art books displaying Michelangelo's *David* to issues of *Sports Illustrated* depicting male Olympic swimmers"—is "of unprecedented breadth." A. 20a (B. Fletcher, J., dissenting).[8] Indeed, neither the County nor the *en banc* majority undertook to identify a single other jail or prison system with anywhere near such a sweeping prohibition. *See Turner*, 482 U.S. at 93 n.* (noting relevance to reasonableness inquiry of "the practice of other well-run institutions, including institutions in the federal system").

No other "well-run institution," to petitioner's knowledge, has gone nearly as far. And at least two federal Courts of Appeals have doubted whether comprehensive bans like the one here at issue could withstand First Amendment scrutiny. *See Owen v. Wille*, 117 F.3d 1235, 1237 (11th Cir. 1997) ("Defense counsel does not contest that a blanket ban on nude photographs would be unconstitutional . . . ."), *cert. denied*, 522 U.S. 1126 (1998); *Giano v. Senkowski*, 54 F.3d 1050, 1056 (2d Cir. 1995) ("the prison's policy is not an 'exaggerated response' to the problem (such as prohibiting all erotica might be)"). In addition, while upholding new federal Bureau of Prisons regulations that prohibit the distribution in federal prisons of "commercial material that is sexually explicit or features nudity," a divided panel of the D.C. Circuit took pains to emphasize features of the challenged regulations that distinguished them from the policy at issue here. *Amatel*, 156 F.3d at 194 (quotation omitted).

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nudity that are not "predominantly oriented" to depictions of "sexual activity or associated anatomical area").

[8] *See id.* at 21a n.1 (noting that the testimony of the deputy chief of the custody bureau confirmed that even pictures of bare-chested men were considered illegal depictions of frontal nudity).

Most significantly, the court noted that under the BOP regulations "[e]ven material that otherwise would be said to 'feature nudity' is excepted if it contains 'nudity illustrative of medical, educational, or anthropological content.'" *Id.* (quoting 28 C.F.R. § 540.72(b) (1998)). The court pointed out that the Bureau had thus made clear in a program statement that publications such as *National Geographic* and *Our Bodies, Our Selves* were permissible under the regulations, as were provocative publications that do not feature nudity, such as the *Sports Illustrated* Swimsuit Edition and the Victoria's Secret catalogue. *Id.* at 202 (citing P.S. 5266.07, at 7). Accordingly, upholding the regulations' constitutionality, the D.C. Circuit stated that "[w]e find it all but impossible to believe that the Swimsuit Edition and Victoria's Secret pass muster while Michelangelo's David or concentration camp pictures fail; nor has there been any suggestion that any prison official has attempted to implement such a bizarre interpretation." *Id.* Here, however, as Judge Schroeder noted, "[t]he record in this case establishes the very facts that the *Amatel* court found 'all but impossible to believe.'" A. 18a.

II. THE *EN BANC* COURT'S DECISION IS IN CONFLICT WITH *THORNBURGH v. ABBOTT*

What, in the view of three of the dissenters below, puts the Ninth Circuit "in conflict with the Supreme Court's teaching in *Thornburgh v. Abbott*, 490 U.S. 401, 417 n.15 [] (1989),"[9] is the *en banc* majority's approval of a subject-matter ban on incoming publications that, in addition to its "unprecedented breadth," A. 20a (B. Fletcher, J., dissenting), is not tempered by any requirement that jail administrators give individualized consideration to inmate requests for materials that include depictions of nudity, which at

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[9] A. 16a (Schroeder J., joined by B. Fletcher, J., and Thomas, J.).

least would prevent some constitutionally protected publications from being needlessly prohibited.

In *Turner v. Safley*, 482 U.S. 78 (1987), as well as invalidating a Missouri prison prohibition on inmate marriages, *see* pp. 22-23, *infra*, this Court upheld the constitutionality of a ban on inmate-to-inmate correspondence within the Missouri prison system. 482 U.S. at 93. The ban, however, was not based on the subject matter of the correspondence. *Id.* It was not until *Thornburgh* that this Court addressed how to apply *Turner*'s "reasonableness" test in the context of a First Amendment challenge to regulations banning incoming materials based on their subject matter.

The federal prison regulations at issue in *Thornburgh* gave wardens the authority to prohibit an incoming publication, including a "sexually explicit" publication, "'if it is determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity.'" 490 U.S. at 404-05 & n.5 (quoting 28 C.F.R. § 540.71(b) (1988)). Beginning its analysis by acknowledging that "[t]here is little doubt that the kind of censorship just described would raise grave First Amendment concerns outside the prison context," *id.* at 407, the Court noted that while "[t]he ban on all correspondence between certain classes of inmates at issue in *Turner* clearly met th[e] 'neutrality' criterion," the issue "in this case is closer," *id.* at 415. The *Thornburgh* Court ultimately concluded that the challenged Bureau of Prisons regulations were "content neutral" for the purpose of prison litigation because "the Court's reference to 'neutrality' in *Turner* was intended to go no further than its requirement in *Martinez* that 'the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression.'" *Id.* (quoting *Procunier v. Martinez*, 416 U.S. 396, 413 (1974)).

The Court upheld the regulations against a facial challenge. Under the circumstances—the first and only time that this Court has addressed under *Turner* the constitutionality of prison rules that expressly and intentionally censor incoming publications based on subject matter—the Court emphasized that it was "comforted" by important safeguards in the regulations. These safeguards ensured that the censorship was neither needlessly broad nor based on the personal prejudices of prison officials, and therefore satisfied the first prong of the *Turner* reasonableness test. *Id.* at 416.

First, the Court endorsed "the individualized nature of the determinations required by the regulation. Under the regulations, no publication may be excluded unless the warden himself makes the determination," and a publication may be rejected only if it is "determined by the warden to create an intolerable risk of disorder under the conditions of a particular prison at a particular time." *Id.* at 416-17. Second, the Court noted with approval that "the regulations expressly reject certain shortcuts that would lead to needless exclusions," such as "establishing an excluded list of publications" or delegating to lower-level employees the power to exclude. *Id.* at 417 (citing 28 C.F.R. §§ 540.70(b), 540.71(c) (1988)). Third, the Court endorsed the discretion vested in high-level prison authorities, observing that although broad discretion could lead to inconsistent results, "[g]iven the likely variability within and between institutions over time . . ., greater consistency might be attainable only at the cost of a more broadly restrictive rule against admission of incoming publications," and cautioning that "[a]ny attempt to achieve greater consistency by broader exclusions might itself run afoul of the second *Turner* factor, *i.e.*, the presence or absence of 'alternative means of exercising the right' in question," *id.* at 417 n.15 (quoting 482 U.S. at 90). Consistent with its endorsement of individualized consideration, the Court remanded the case for

the district court to make "a determination of the validity of the regulations as applied to each of the 46 publications" at issue in the case. *Id.* at 404.

The *en banc* majority's decision here conflicts with this Court's careful admonitions in *Thornburgh* in many respects. To begin with, although contemporaneous evidence showed that "moral[it]y" was one of the motivating factors for the MCSO's total ban on nudity, *see* A. 29a (Kleinfeld, J., dissenting); E.R. 81, and that one of the asserted goals of the policy was to prevent "inappropriate comments to the females," E.R. 80, the majority had no trouble pronouncing that "[t]he requirement that the policy be 'neutral'"—*i.e.*, furthering an interest unrelated to the suppression of expression—"is . . . unquestionably met in this case," A. 7a.[10]

In addition, none of the safeguards that comforted this Court in *Thornburgh* is present here. The MCSO ban is total, with no exceptions of any kind. Nor is there any individualized consideration, for instance, of whether requested materials containing nude images pose a risk of misuse at a particular jail and at a particular time—whether the requested publication is *Playboy* or a medical encyclopedia. A. 68a-69a. *Both* of the disfavored "shortcuts that would lead to needless exclusions" mentioned in *Thornburgh*, 490 U.S. at 417—making a list of excluded publications and delegating exclusionary decisions to low-level employees—are prominent features of the policy. A. 16a (Schroeder, J. dissenting). And the MCSO chose precisely the type of "more broadly restrictive rule," 490 U.S. at 417

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[10] By contrast, the *Thornburgh* Court observed that prison regulations invalidated in *Martinez*, 416 U.S. 396, prohibiting incoming or outgoing writings that, *inter alia*, expressed "'inflammatory . . . views'" or were "'otherwise inappropriate'" were "*decidedly* not 'neutral' in the relevant sense." 490 U.S. at 416 n.14 (quoting 416 U.S. at 415) (emphasis added).

n.15, that the *Thornburgh* Court praised the Bureau of Prisons for avoiding: "Under the policy, *all* materials containing frontal nudity are prohibited. Thus, jail employees must simply determine whether the material in question contains frontal nudity; if it does, it is prohibited under the policy." A. 9a n.5 (emphasis in original).

The *en banc* majority thus read all the *Thornburgh*-endorsed safeguards out of the *Turner* reasonableness standard. But *Thornburgh* plainly instructs that, when venturing into the perilous area of censorship based on the subject matter of expressive materials, prison authorities must, at a minimum, do one of two things: either provide individualized consideration of requested materials so as not needlessly to exclude benign materials that are otherwise protected by the First Amendment, or narrow the category of restricted materials to achieve the same result. 490 U.S. at 416-17. *See Amatel*, 156 F.3d at 212 (Wald, J., dissenting) ("It was this 'individualized nature' of the determinations that led the *Thornburgh* Court to conclude that the regulations at issue in that case were rationally related to security interests, the nature of which . . . can change over time"). *Cf. Kikumura v. Turner*, 28 F.3d 592, 598 (7th Cir. 1994) ("The gloss that *Thornburgh* puts on the *Turner* factors leads us to conclude that summary exclusion of foreign language materials is unconstitutional"), *cert. denied*, 514 U.S. 1005 (1995).

Just as plainly, the MCSO policy upheld by the *en banc* majority does neither. As the original three-judge panel observed below, "in direct contradiction of the Supreme Court's cautionary language in *Thornburgh*, Maricopa County has enacted a regulation that sweeps too broadly,

indiscriminately eliminating large categories of materials without individualized consideration." A. 49a.[11]

III. THE *EN BANC* COURT'S DECISION IS IN CONFLICT WITH *TURNER v. SAFLEY* AND WITH DECISIONS OF OTHER CIRCUITS

In addition to rejecting any First Amendment requirement that individualized consideration be given to requests for publications, the *en banc* majority reached its "bizarre" and "all but impossible to believe" result, *Amatel*, 156 F.3d at 202, by changing the reasonableness standard set forth by this Court in *Turner*. The majority did so, first, by "dramatically diminish[ing] the level of scrutiny that courts ordinarily are to apply to the decisions of prison administrators," *Frost v. Symington*, 1999 WL 1054897, at *7 (9th Cir. Nov. 23, 1999), and, second, by interpreting *Turner*'s fourth prong—"whether the policy is an 'exaggerated response' to the jail's concerns," A. 5a—as requiring that an inmate plaintiff first propose sufficiently cost-free alternatives to a challenged policy before a court will even *consider* whether the policy is needlessly overbroad or otherwise unreasonably excessive in relation to its legitimate objectives. A. 12a-15a. This modification of *Turner*'s rea-

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[11] In *Thornburgh*, this Court cited a work of fiction, Dostoyevsky's *House of the Dead*, for an extreme example of a "broadly restrictive rule against admission of incoming publications." 490 U.S. at 417 n.15 (inmates permitted to have only the Bible). The MCSO policy, in arbitrarily cutting from inmates' reading lists a swath of "illustrated educational, religious, or other materials that may contain nude figures," A. 16a (Schroeder, J., dissenting), itself resembles another fictional ban on publications available to a prisoner. *See* E. Hale, *The Man Without a Country* 15 (Chapman Billies, Inc. 1994) ("He had almost all the foreign papers that came into the ship . . .; only somebody must go over them first, and cut out any advertisement or stray paragraph that alluded to America").

sonableness test is in conflict with the decisions of this Court and of the Sixth, Seventh, and Eighth Circuits.

A. The Decision Conflicts with *Turner v. Safley*.

This Court instructed in *Turner* that, while prison authorities must be accorded significant deference in carrying out their difficult job, "'[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.'" 482 U.S. at 84-85 (quoting *Martinez*, 416 U.S. at 405-06). The four-prong "reasonableness" standard that the Court settled on for judging prison rules, *see* p. 5, *supra*, was, the Court advised, appropriately "responsive both to the policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights." 482 U.S. at 85 (quotation omitted). Applying this reasonableness standard, the Court struck as unconstitutional a Missouri prison regulation that prohibited inmates from marrying—either other inmates or civilians—unless the prison superintendent determined that there was a compelling justification for the marriage. *Id.* at 96-98.

The *Turner* defendants had "identified both security and rehabilitation concerns in support of the marriage prohibition"—specifically, avoiding "love triangles" that "might lead to violent confrontations between inmates" and preventing excessive dependence by *female* inmates on abusive males, because "these women prisoners needed to concentrate on developing skills of self-reliance." *Id.* at 97. Applying the first prong of the reasonableness test, the Court held that the marriage ban failed to pass constitutional muster because it "sweeps *much more broadly* than can be explained by petitioners' penological objectives." 482 U.S. at 98 (emphasis added). Specifically, the Court held that since prison officials had testified that "generally they had experienced no problem with the marriage of *male* inmates," the state's proffered justifications failed to ex-

plain a total ban on both female *and* male inmates getting married and was therefore invalid. *Id.* at 98-99 (emphasis added). Similarly, since prison officials also had never had a problem with inmate-*civilian* marriages, and the officials' rehabilitation concerns were "centered almost exclusively on female inmates marrying other inmates or ex-felons," the regulation was unconstitutionally broad for the additional reason that it did "not account for the ban on inmate-civilian marriages." *Id.* at 99.

Moreover, holding that the Missouri regulation's broad sweep amounted to an "exaggerated response to . . . security objectives," the Court noted that "obvious, easy alternatives" to the Missouri regulation that would accommodate both the inmates' constitutional rights and the prison's concerns included a federal regulation, 28 C.F.R. § 551.10 (1986), that permitted inmates to marry unless the warden specifically found the marriage to pose a threat to prison security. *Id.* at 97-98. The Court considered this alternative as evidence of unreasonableness even though the inmate plaintiffs appear not to have raised that alternative on their own. *See* Brief for Respondents, *Turner v. Safley*, No. 85-1384 (Sept. 11, 1986).

The similarity between the record here and the record in *Turner* in striking. The Maricopa County jail policy bans all depictions of nudity, including depictions of males, even though it had never experienced a problem with alleged misuse of nude pictures of men. In addition, depictions of the nude human form in educational, medical, or artistic materials had never posed a problem to security or other jail concerns, yet the MSCO needlessly included all such materials in its ban. A. 59a. Thus, like the regulation invalidated in *Turner*, the MCSO policy unreasonably "sweeps much more broadly than can be explained by petitioners' penological objectives." 482 U.S. at 98.

In addition, examples of "obvious" and "easy" alternatives to the MCSO policy that would protect female prison guards while respecting inmates' free-speech rights abound—in, for instance, the numerous reported cases upholding prison bans on sexually explicit materials that either exempt depictions of nudity contained in educational, medical, and other nonprurient works, *see, e.g.*, *Amatel*, 156 F.3d at 194, or require prison administrators to determine before censoring that a particular publication poses a risk at a particular time and place, *see, e.g.*, *Thornburgh*, 490 U.S. at 404-05.

The *en banc* majority's interpretation of the reasonableness test conflicts with *Turner*. Under the first prong of the *Turner* test, despite this Court's instruction to inquire whether the logical connection between the asserted goal and the prison rule was too "remote," 482 U.S. at 89, the majority held that "[t]he *only* question that we must answer is . . . whether the defendants might reasonably have thought that the policy would *advance* its interests." A. 7a-8a (emphasis added). Refusing thus even to consider the degree to which the total ban on nudity was, although effective, grossly overbroad, the majority repeated that "*all that is required* is that there be a 'rational' connection between the policy and the jail's legitimate objectives." A. 9a (emphasis added).

In the words of a subsequent appellate panel, under the *Mauro* decision the Ninth Circuit now "holds that . . . as long as it is *plausible* that prison officials believed the policy would *further* a legitimate objective, the governmental defendant should prevail on *Turner*'s first prong." *Frost*, 1999 WL 1054897, at *7 (emphasis added). This, however, is contrary to *Turner*. As Judge Wald noted in dissent in *Amatel*, the *Turner* Court "did not say, for example, that prison regulations are valid if there is any conceivable basis for their existence, as rational basis review is typically for-

mulated . . . . Rather, the task for courts is to determine, while giving appropriate deference to the judgment of prison officials, whether a challenged regulation is, in fact, reasonable or whether it is an 'exaggerated response.'" *Amatel*, 156 F.3d at 205 (Wald, J., dissenting).

Similarly, the *en banc* majority held that it need not consider under the fourth prong whether the regulation is an exaggerated response to the asserted problem—unless the inmate plaintiff as a condition precedent first identifies alternatives to the policy that the court determines are sufficiently obvious and inexpensive. Quite explicitly, the majority instructed that "[i]t is incumbent upon the *prisoners* to point to an alternative that accommodates their rights at de minimis cost to security interests" before the court would consider this factor. A. 12a-13a (emphasis in original; quotation omitted). Adding its own emphasis to language from the *Turner* opinion, the majority reiterated that it would not consider whether a regulation is unreasonable as an "'exaggerated response'" unless "'an *inmate* claimant can point to an alternative.'" A. 12a (quoting *Turner*, 482 U.S. at 90-91) (emphasis added by Court of Appeals). Because it found that neither of the alternatives that Mauro had advanced in the district court—providing a reading room for materials including nudity or ensuring that only psychologically fit inmates viewed such materials—was sufficiently obvious or "easy," the majority held that it would not even examine whether the "unprecedented breadth," A. 20a (B. Fletcher, J., dissenting), of the policy constituted an exaggerated response to the asserted problems. A. 15a.

Had the Ninth Circuit's analysis been applied in *Turner*, there is no doubt that the Missouri marriage ban would have been upheld, since banning all inmate marriages plainly "advanced" the goals of reducing the influence on female inmates of abusive men. In addition, since

the plaintiff inmates in *Turner* apparently did not point to the federal regulation as an "obvious, easy" alternative, the *en banc* majority would never even have asked whether the marriage regulation swept too broadly.[12]

B. The Decision Conflicts with Decisions of the Sixth, Seventh, and Eighth Circuits.

The D.C. Circuit in *Amatel* recently expressed the view that "[p]rison jurisprudence" under *Turner* "is not well enough developed to indicate precisely how demanding the requirement of rational means-end connection is." 156 F.3d at 198. It is at least well enough developed, however, to demonstrate that the Ninth Circuit is now in conflict with other Courts of Appeals regarding a court's obligation to weigh all relevant factors—including a prison rule's excessiveness—in determining whether prisons have justified the reasonableness of regulations that impinge on inmates' fundamental constitutional rights.

Thus, advising that "[o]ur usual prefatory declaration that prisoners retain certain basic constitutional rights has meaning," the Eighth Circuit, in direct conflict with the *en banc* court, has interpreted *Turner* to require that courts "make sure after an *independent* review of the evidence that

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[12] Because it prematurely terminated its scrutiny of the MCSO policy, the majority never considered the many indications that the no-nudity, no-exceptions policy was an exaggerated response to the alleged problems of inmates using nude pin-ups to incite fights and harass female guards. These include (i) the absence of any evidence supporting the breadth of the policy; (ii) the County's failure to attempt any intermediate steps, such as punishing those who used nude pictures to harass female guards, instead of "bann[ing] the magazines and other materials for everyone," A. 30a (Kleinfeld, J., dissenting), or at least prohibiting the display of nude pictures before banning their possession, *id.* at A. 32a; and (iii) the ban's indiscriminate application to nonharassing, nonviolent pretrial detainees like Mauro "whom the state holds as prisoner but who have not yet been convicted of crimes," *id.* at A. 30a.

the regulation is *not an exaggerated response* to prison concerns." *Salaam v. Lockhart*, 905 F.2d 1168, 1171 (8th Cir. 1990) (emphasis added), *cert. denied*, 498 US. 1026 (1991). Reversing a district court's denial of relief to an inmate plaintiff who sued to require the Arkansas Department of Corrections to recognize his new Islamic name, the court advised that "[r]easonableness in this context refers not *only* to the relation between the goals of a regulation and its means, but *also* to the balance struck between the needs of the prison administrators and the constitutional rights of prisoners." *Id.* at 1171 n.6 (emphasis added). Finding that the department of corrections' policy, which refused to recognize name changes because of the claimed administrative burden, "far exceeds in its scope the administrative interests recognized by state law," the court found the policy to be an exaggerated response and therefore unreasonable. *Id.* at 1175. The court noted as well that proposed alternatives do not "have to be entirely cost-free; costs that are insubstantial in light of the overall maintenance of the prison are acceptable." *Id.* at 1171. *See also Thongvanh v. Thalacker*, 17 F.3d 256, 259 (8th Cir. 1994).

Also in direct conflict with the *en banc* court, the Seventh Circuit has held that "[t]he obvious implication" of *Turner*'s fourth prong "is that a prison may not restrict a prisoner's rights without even *looking to see* how the rights might be accommodated and *estimating* the expense entailed by doing so." *Kikumura v. Turner*, 28 F.3d 592, 599 (7th Cir. 1994) (emphasis added), *cert. denied*, 514 U.S. 1005 (1995). Likewise, in *Shimer v. Washington*, 100 F.3d 506 (7th Cir. 1996), emphasizing that "we do engage in an actual, albeit limited, inquiry" and that "[t]he prison administration cannot avoid court scrutiny by reflexive, rote assertions," the Seventh Circuit held that evidence to suggest more than a "tangential[]" connection between the asserted problem and the rule implemented to address it "should be at the heart of the *Turner* analysis." *Id.* at 510.

And, in *Whitney v. Brown*, 882 F.2d 1068 (6th Cir. 1989), a case involving a challenge to a policy prohibiting Jewish inmates with different security classifications from congregating for weekly Sabbath services, although the Sixth Circuit found plausible the connection between the policy and the prison's security "goal of minimizing mingling between inmates of different security levels," *id.* at 1073, the court did not end its inquiry there. Instead, the court held that "even if the inmates' arguments" regarding alternatives to the policy "are *disregarded*," the policy flunked the *Turner* reasonableness test because, among other reasons, obvious inconsistencies in its application were sufficient to show that the prohibition was "an exaggerated response to speculative security objectives, and, therefore, . . . invalid." *Id.* at 1077-78 (emphasis added). *See also Muhammad v. Pitcher*, 35 F.3d 1081, 1085, 1086 (6th Cir. 1994) (finding prison policy an unreasonable, exaggerated response even though the inmate plaintiff had suggested no alternative "other than simply abandoning the policy").

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Jonathan D. MAURO, Plaintiff-Appellant,

v.

Joseph M. ARPAIO, Sheriff; Maricopa County, a political subdivision of the State of Arizona, Defendants-Appellees.

No. 97-16021.

United States Court of Appeals,

Ninth Circuit.

Argued and Submitted March 25, 1999

Filed Aug. 17, 1999

Nicholas S. Hentoff, Phoenix, Arizona, for the plaintiff-appellant.

Daniel P. Struck and David C. Lewis, Jones, Skelton & Hochuli, Phoenix, Arizona, for the defendants-appellees.

Appeal from the United States District Court for the District of Arizona; Robert C. Broomfield, District Judge, Presiding, D.C. No. CV-95-02729-RCB.

Before: HUG, Chief Judge, SCHROEDER, FLETCHER, BRUNETTI, FERNANDEZ, RYMER, T.G. NELSON, KLEINFELD, TASHIMA, THOMAS and WARDLAW, Circuit Judges.

Opinion by Judge T.G. NELSON; Dissents by Judge SCHROEDER, FLETCHER and KLEINFELD.

T.G. NELSON, Circuit Judge:

This case concerns the constitutionality of a policy issued by Joseph M. Arpaio, in his capacity as Maricopa County Sheriff, prohibiting inmates from possessing "sexu-

ally explicit material." Jonathan Mauro, an inmate in the Maricopa County jail system, filed an action under 42 U.S.C. § 1983 claiming that the policy infringed on his First Amendment rights. Because we conclude that the policy is reasonably related to legitimate penological interests, we hold that the policy is a valid restraint on Mauro's First Amendment rights.

I.

The Maricopa County jail system is one of the country's largest, housing 6500 inmates at any given time. The average inmate stay is slightly less than fourteen days. Until 1993, the jail had no policy restricting possession of sexually explicit materials.

Prior to adoption of the policy challenged by Mauro, female detention officers were faced with situations in which male inmates compared the officers' anatomy to that of nude women depicted in various publications, often *Playboy* magazine centerfolds. The officers would be invited to look at the breasts on these nude models, or asked their opinion about shaved genitalia. The officers would also encounter inmates who were openly masturbating while looking at sexually explicit pictures. One inmate told an officer that he was mentally having anal intercourse with Miss July, and when he was done, he was going to do the same to the officer. The officers were confronted with this type of behavior often, ranging from several times daily to several times a week.

In response to this problem, on August 6, 1993, the jail administration instituted a policy which prohibited inmates from possessing "sexually explicit materials." The notice to the inmates only included the prohibition on sexually explicit materials, while the accompanying notice to jail employees defined "sexually explicit materials" as "materials that show frontal nudity" including "personal photographs,

drawings, and magazines and pictorials that show frontal nudity." Pursuant to the policy, sexually explicit materials found in the possession of inmates are confiscated and destroyed.

Implementation of the policy resulted in a sharp decrease in the number of problems encountered by the female officers. The officers reported that the situations declined to only happening to them occasionally, if at all. Also, from August 1993, when the policy was implemented, until August 1995, no inmate had requested authorization to receive and possess sexually explicit materials that are prohibited under the policy.

Jonathan D. Mauro was incarcerated in the Maricopa County jail system as a pretrial detainee in August 1995. He requested that he be allowed to receive a *Playboy* magazine, which was denied pursuant to the policy. He filed suit under 42 U.S.C. § 1983 against Maricopa County and its sheriff, Joseph Arpaio, claiming that the policy infringed his rights under the First Amendment.

The district court granted the defendants' motion for summary judgment and Mauro appealed. A panel of this court reversed. *See Mauro v. Arpaio*, 147 F.3d 1137 (9th Cir.1998). The panel opinion was withdrawn when this court voted to rehear the case en banc. *See Mauro v. Arpaio*, 162 F.3d 547 (9th Cir.1998).

II.

We begin our discussion with a review of two basic and potentially competing principles that necessarily frame our analysis of Mauro's constitutional claim. The first of these principles is that prisoners are not stripped of the protections of the Constitution upon incarceration. *See Turner v. Safley*, 482 U.S. 78, 84, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). Thus, "when a prison regulation or practice offends a fundamental constitutional guarantee,

federal courts will discharge their duty to protect [prisoners'] constitutional rights." *Id.*

The second basic principle that frames our analysis is that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform." *Id.*

> [T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have ... additional reason to accord deference to the appropriate prison authorities.

Id. at 84-85, 107 S.Ct. 2254 (citations omitted).

To maintain the necessary balance between these two basic principles, we must apply a deferential standard of review to challenges regarding prison regulations and uphold the regulation "if it is reasonably related to legitimate penological interests." *Id.* at 89, 107 S.Ct. 2254.

> [S]uch a standard is necessary if prison administrators, and not the courts, are to make the difficult judgments concerning institutional operations. Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court

> somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby unnecessarily perpetuating the involvement of the federal courts in affairs of prison administration.

Id. (citations, quotations and ellipses omitted).

III.

To determine whether the jail's policy of excluding all material containing frontal nudity "is reasonably related to legitimate penological interests," and therefore valid, we must consider four factors: (1) whether there is a valid, rational connection between the policy and the legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the right; (3) whether the impact of accommodating the asserted constitutional right will have a significant negative impact on prison guards, other inmates and the allocation of prison resources generally; and (4) whether the policy is an "exaggerated response" to the jail's concerns. *See id.* at 89-90, 107 S.Ct. 2254; *Casey v. Lewis*, 4 F.3d 1516, 1520 (9th Cir.1993).

A. *Rational Connection*

The first factor we must consider is whether there is a rational connection between the challenged policy and a legitimate governmental interest. *See Turner*, 482 U.S. at 89, 107 S.Ct. 2254. This requires us to determine whether the governmental objective underlying the policy is (1) legitimate, (2) neutral, and (3) whether the policy is "rationally related to that objective." *Thornburgh v. Abbott*, 490 U.S. 401, 414, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989).

The jail's policy of excluding sexually explicit materials is expressly aimed at maintaining jail security, rehabili-

tating inmates and reducing sexual harassment of female detention officers. It is beyond question that both jail security and rehabilitation are legitimate penological interests.[1] *See id.* at 415, 109 S.Ct. 1874 (prison security); *Turner*, 482 U.S. at 91, 107 S.Ct. 2254 (prison security); *Pell v. Procunier*, 417 U.S. 817, 823, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974) (rehabilitation); *Procunier v. Martinez*, 416 U.S. 396, 413-14, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974) (prison security, order and rehabilitation). Moreover, although no court has addressed whether reducing sexual harassment of prison employees is a legitimate penological interest, there is no doubt that protecting the safety of guards in general is a legitimate interest, and that reducing sexual harassment in particular likewise is legitimate.[2] *See Folkerson v. Circus Circus Enters., Inc.*, 107 F.3d 754, 756 (9th Cir.1997) (holding that employer may be liable for failing to prevent sexual harassment of employee by co-workers and by private individuals, such as business patrons).

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[1] The jail houses a mix of pretrial detainees and convicted inmates. The jail's goal of rehabilitation is a legitimate goal only to the extent that it applies to the convicted inmates housed at the jail. It is not a legitimate goal to the extent that the jail is attempting to impose rehabilitation on the pretrial detainees housed at the jail. *See United States v. Hearst*, 563 F.2d 1331, 1345 n. 11 (9th Cir.1977) ("[A] pretrial detainee may assert his status as a shield against intrusive practices aimed solely at rehabilitation but not against practices aimed at security and discipline.").

[2] In his dissent, Judge Kleinfeld maintains that there is a genuine issue of material fact regarding whether the jail's policy of excluding sexually explicit materials was imposed for the purpose of punishing pretrial detainees. This issue was not raised by the parties in their briefs before this court. The issue has therefore been waived. *See Stivers v. Pierce*, 71 F.3d 732, 740 n. 5 (9th Cir.1995) (holding that parties waived issue by failing to raise it in their briefs).

The requirement that the policy be "neutral" is also unquestionably met in this case. As the Court explained in *Thornburgh*, to meet *Turner*'s "neutrality" test,

> the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. Where, as here, prison administrators draw distinctions between publications solely on the basis of their potential implications for prison security, the regulations are "neutral" in the technical sense in which we meant and used that term in *Turner*.

490 U.S. at 415-16, 109 S.Ct. 1874 (quotations and citation omitted).

Here, as in *Thornburgh*, the jail administrators drew a distinction between materials solely on the basis of the materials' potential effect on the prison's legitimate objectives. The regulations are therefore "neutral" in the technical sense required under *Turner* and *Thornburgh*. *See* 490 U.S. at 415-16, 109 S.Ct. 1874; *Amatel v. Reno*, 156 F.3d 192, 197-98 (D.C.Cir.1998); *Dawson v. Scurr*, 986 F.2d 257, 261 (8th Cir.1993).

Finally, the requirement that the policy be rationally related to the jail's legitimate objectives is met in this case. To show a rational relationship between a regulation and a legitimate penological interest, prison officials need not prove that the banned material actually caused problems in the past, or that the materials are "likely" to cause problems in the future. *See Thornburgh*, 490 U.S. at 417, 109 S.Ct. 1874; *Casey*, 4 F.3d at 1521. Moreover, it "does not matter whether we agree with" the defendants or whether the policy "in fact advances" the jail's legitimate interests. *See Amatel*, 156 F.3d at 199. The only question that we must answer is whether the defendants' judgment was "rational," that is, whether the defendants might reasonably

have thought that the policy would advance its interests. *See id.*

The relationship between the possession of sexually explicit materials and the problems sought to be addressed by the policy—sexual harassment of female officers, jail security and rehabilitation of inmates—is clear. In the past,[3] inmates have used nude photographs to draw anatomical comparisons with the wives, girlfriends and mothers of other inmates, which in turn led to fights and disturbances by the inmates and created a security risk for both inmates and jail employees; to draw anatomical comparisons between the female detention officers and the persons depicted in the photographs; and to openly masturbate in front of and otherwise sexually harass the female officers.

The relationship between the jail's policy of prohibiting the possession of sexually explicit materials and the goals of preventing sexual harassment of the female officers, inmate rehabilitation and maintenance of jail security is not so "remote as to render the policy arbitrary or irrational."[4]

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[3] Although it is not required that prison officials be able to show that the prohibited materials have actually caused problems in the past, *see Casey*, 4 F.3d at 1521, their ability to do so certainly strengthens their case.

[4] That the jail policy may exclude artistic or scientific journals does not render the policy unconstitutionally overbroad. As the Court held in *Thornburgh*, a prison regulation does not need to pass the "least restrictive alternative test" to withstand constitutional challenge. *See* 490 U.S. at 414, 109 S.Ct. 1874. Rather, as long as the regulation withstands the *Turner* reasonableness test, it will be deemed constitutional. *See id.*

Moreover, as the district court found:

> [I]t is not "so remote" a possibility for prisoners to barter nude photographs or drawings in artistic and scientific magazines, to use such photographs to draw anatomical comparisons with the wives or girlfriends of other inmates, and to use such photos to sexually harass female detention officers. In fact, the

See Turner, 482 U.S. at 89-90, 107 S.Ct. 2254; *Amatel*, 156 F.3d at 200-01; *Dawson*, 986 F.2d at 261 (holding regulation restricting access to sexually explicit materials is rationally related to goals of prison security and inmate rehabilitation). Although, as the defendants candidly admit, the "fit" between the policy and the jail's objectives is not "exact," an exact fit is not required. Rather, all that is required is that there be a "rational" connection between the policy and the jail's legitimate objectives. This standard is met.[5]

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court finds no marked distinction between plaintiff's Exhibit 1, depicting a live nude female model on the cover of an art magazine, and a photograph of a nude female model in *Playboy*. Finally, it is interesting to note that one of the very publications that Mauro points to in support of his claim that the policy is "overbroad"—*National Geographic*—is available in the jail library. In fact, Mauro has been unable to document a single instance in which a prisoner's request for a copy of *National Geographic*, or any other "scientific" publication, has been refused because of content.

[5] We reject Mauro's argument that the policy is not "rationally related" because it gives jail employees "unbridled discretion." As the Court made clear in *Thornburgh*, regulations which give broad discretion to prison authorities are appropriate where the regulations concern materials *coming into* a prison. *See* 490 U.S. at 416, 109 S.Ct. 1874. Moreover, rather than giving jail employees unbridled discretion, as Mauro contends, the policy actually grants little, if any, discretion to jail employees. Under the policy, *all* materials containing frontal nudity are prohibited. Thus, jail employees must simply determine whether the material in question contains frontal nudity; if it does, it is prohibited under the policy.

We also reject Mauro's argument that the policy is unconstitutionally "vague." By excluding all materials containing frontal nudity, the policy sets out a bright-line rule. This bright-line rule not only limits the discretion available to jail employees, but also ensures consistency in the exclusion of materials. There is nothing vague about this policy.

B. *Alternative Avenues*

The second factor we must consider in determining the reasonableness of the policy's restriction on constitutional rights is "whether there are alternative means of exercising the right that remain open to prison inmates." *Turner*, 482 U.S. at 90, 107 S.Ct. 2254. "Where 'other avenues' remain available for the exercise of the asserted right, courts should be particularly conscious of the 'measure of judicial deference owed to corrections officials ... in gauging the validity of the regulation.'" *Id.* (citations omitted).

In applying this factor, "the right in question must be viewed sensibly and expansively." *Thornburgh*, 490 U.S. at 417, 109 S.Ct. 1874 (quotations omitted). For example, in *Turner*, the Court upheld a regulation that restricted correspondence between inmates at different state prisons. In doing so, the Court rejected the argument that inmates should be afforded other means of communicating with inmates at other institutions, finding it sufficient if other means of *expression* remained available to the inmates. *See Turner*, 482 U.S. at 92, 107 S.Ct. 2254.

Similarly, in *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987), the Court upheld a regulation that restricted inmates' ability to attend the Jumu'ah, a Muslim religious ceremony, finding it sufficient if the inmates were permitted to participate in other Muslim religious ceremonies. *See id.* at 351-52, 107 S.Ct. 2400. Finally, in *Thornburgh*, the Court upheld a regulation restricting the incoming publications that inmates could receive and possess, finding sufficient alternative means available to the inmates because the regulations permitted "a broad range of publications to be sent, received, and read." *See Thornburgh*, 490 U.S. at 417-18, 109 S.Ct. 1874; *see also Amatel*, 156 F.3d at 201.

We agree with the district court that a sensible and expansive view of the constitutional right infringed by the jail's policy is the "right to receive sexually explicit communications." Viewed in this sensible and expansive manner, there are many alternative means available to the inmates. As the district court recognized, although the policy bans all sexually explicit materials depicting frontal nudity, it does not ban sexually explicit letters between inmates and others, nor does it ban sexually explicit articles or photographs of clothed females. *See Amatel*, 156 F.3d at 202 ("[T]he regulation by its terms only restricts pictures; a prisoner may *read* anything he pleases.")

C. *Impact on Others*

The third factor that we must address is the impact that accommodation of the asserted constitutional right would have on prison personnel, other inmates, and the allocation of prison resources. *See Turner*, 482 U.S. at 90, 107 S.Ct. 2254. This factor requires us to determine the impact of allowing inmates unrestricted access to sexually explicit materials. *See id.* at 92, 107 S.Ct. 2254.

The impact of such unrestricted access would be significant. As discussed previously, such access could lead to the bartering of sexually explicit materials and anatomical comparisons which could in turn lead to fights between inmates. These fights jeopardize not only the safety of jail employees, but also other inmates.

Moreover, as also previously discussed, allowing inmates unlimited access to sexually explicit materials would expose the female detention officers, whose complaints originally led to the adoption of the policy, to sexual harassment and a hostile work environment. "Where, as here, the right in question 'can be exercised only at the cost of significantly less liberty and safety for everyone else, guards and other prisoners alike,' [we] should defer to the

'informed discretion of corrections officials.'" *Thornburgh*, 490 U.S. at 418, 109 S.Ct. 1874 (quoting *Turner*, 482 U.S. at 90-92, 107 S.Ct. 2254).

D. *Exaggerated Response*

The fourth and final factor that we must address is whether the policy is an exaggerated response to the jail's concerns.

> [T]he absence of ready alternatives is evidence of the reasonableness of a prison regulation. By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an "exaggerated response" to prison concerns. This is not a "least restrictive alternative" test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint. But if an *inmate* claimant can point to an alternative that fully accommodates the prisoner's rights at de minimis cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.

Turner, 482 U.S. at 90-91, 107 S.Ct. 2254 (emphasis added) (citations omitted).

The burden is on the prisoner challenging the regulation, not on the prison officials, to show that there are obvious, easy alternatives to the regulation. *See O'Lone*, 482 U.S. at 350, 107 S.Ct. 2400 ("By placing the burden on prison officials to disprove the availability of alternatives, the approach articulated by the Court of Appeals fails to reflect the respect and deference that the United States Constitution allows for the judgment of prison administrators."); *Turner*, 482 U.S. at 91, 107 S.Ct. 2254; *Casey*, 4 F.3d at 1523 ("It is incumbent upon the *prisoners* to point

to an alternative that accommodates their rights at *de minimis* cost to security interests." (emphasis added)).

Mauro pointed to two alternatives in the district court: (1) a reading room for inmates to view sexually explicit materials; and (2) psychological testing of inmates who would be "fit" to receive sexually explicit materials.[6] We agree with the district court that both of these alternatives would impose more than a *de minimis* cost on valid penological interests and are therefore inadequate alternatives to the policy.

First, confining sexually explicit materials to a reading room would not prevent the sexual harassment of female detention officers. In fact, the female officers transporting inmates to and from the reading room, as well as those monitoring the reading room, would be especially vulnerable to sexual harassment by the inmates. As Deputy Chief Larry Wendt stated in his deposition, the creation of a reading room "does not guarantee that female detention officers would not be subjected to the same kind of harassment and verbal abuse that they endured before adoption of the Policy in 1993."

Moreover, the creation of such a reading room would impose a significant administrative burden on the jail: inmates from different custody levels would need to be escorted to and from the reading room; strip searches of the inmates leaving the reading room would have to be con-

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[6] Mauro points to several more alternatives on appeal that were not raised in the district court. Resolution of whether these newly raised alternatives would be adequate to address the jail's concerns would involve facts not fully developed in the record. We must therefore decline to address these new arguments on appeal. *See Woods v. Saturn Distrib. Corp.*, 78 F.3d 424, 430 (9th Cir.1996); *Bolker v. C.I.R.*, 760 F.2d 1039, 1042 (9th Cir.1985).

ducted; and the reading room would have to be monitored. As Deputy Chief Wendt stated in his affidavit:

> 6. Specifically, the proposal [of a reading room] is incompatible with the current design structure of the MCSO jails. Simply transporting inmates (from all custody levels) to a central reading room would be a logistical nightmare. Additionally, the current rooms used for attorney and family visitation are already over capacity. To accept Plaintiff's proposal would require the County to spend funds to build an entirely new room or unit with budgetary funds it does not have in its possession and on vacant space that it does not own.
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> 7. The proposal would also impose an administrative burden on detention officers who would be required to transport inmates to and from the room, as well as the inconvenience of the strip-searching of every inmate before they may enter the room. We (MCSO command staff) simply do not have the manpower to provide this extra service for inmates. Even assuming only one percent (1%) of the approximately 6,500 MCSO inmates would want to use the room on a weekly basis, MCSO would have to escort sixty-five (65) inmates every week to this central reading room. We do not have the time or the available staff to accommodate this service.

The second alternative Mauro proposes, the psychological testing of inmates, is also an inadequate alternative. Although psychological testing may prevent sexual offenders from receiving sexually explicit materials and therefore adversely affecting their rehabilitation, such testing would not address the other reasons for having the policy-prison security and sexual harassment of the female detention officers. *See Friend v. Kolodzieczak*, 923 F.2d 126, 128 (9th Cir.1991) (holding that inmates' proposed alternative was

inadequate where it satisfied some, but not all, of prison officials' concerns).

Because Mauro failed "to point to an alternative that accommodates [his] rights at *de minimis* cost to security interests," we hold that the policy "is not an exaggerated response" to the problems sought to be addressed by the defendants. *See Casey*, 4 F.3d at 1523.

IV.

We recognize that there may be a different, less restrictive means of achieving defendants' legitimate objectives. Under *Thornburgh*, however, the defendants are not required to adopt the least restrictive means of achieving these objectives. Rather, the defendants must simply ensure that the policy is reasonably related to legitimate penological interests. Because, under the facts of this case, the prohibition on sexually explicit materials fulfills this reasonableness test, we hold that the policy does not violate the First Amendment.

AFFIRMED.

DISSENTING OPINION

SCHROEDER, Circuit Judge, with whom Judges B. FLETCHER and THOMAS, Circuit Judges, join, dissenting:

I respectfully dissent.

The majority upholds a regulation that is not the regulation being enforced by Maricopa County in its jails. The County's regulation defines "sexually explicit" materials as those materials that "show frontal nudity." It bans publications ranging from the *National Geographic* to art books

displaying Michelangelo's David. At the same time, it permits inmates to receive the *Sports Illustrated* swimsuit issues and seductive lingerie catalogs. The Maricopa County regulation is not rationally related to any goal of rehabilitation, security, or preventing sexual harassment. It thus fails the primary test articulated by the Supreme Court in *Turner v. Safley*, 482 U.S. 78, 89-90, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987).

The majority treats the regulation as if it were far narrower and limited to sexually explicit depictions like those contained in hard or soft core pornographic publications. As our panel originally and unanimously held, the regulation is overbroad and flunks the second *Turner* test as well. It leaves no alternative means for inmates to exercise their First Amendment rights to illustrated educational, religious, or other materials that may contain nude figures but are unrelated to any of the penological concerns underlying the regulation.

In upholding the regulation, the majority puts us in conflict with the Supreme Court's teaching in *Thornburgh v. Abbott*, 490 U.S. 401, 417 n. 15, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989), that prisons should eschew prohibition of broad categories of publications. The Court, in *Thornburgh*, approved a regulation that permitted a federal prison warden to exclude any specific publication after the warden determined that it was "detrimental to the security, good order, or discipline of the institution." *Id.* at 416, 109 S.Ct. 1874. Although the standard for exclusion may have seemed broad, the Court explained that it was circumscribed by the requirement that "no publication may be excluded unless the warden himself makes the determination." *Id.* The Court favorably referred to other provisions of the regulation that prohibited the warden from delegating his exclusion power or establishing a list of excluded publications. *Id.* at 416-17, 109 S.Ct. 1874.

In contrast, Maricopa County's policy places the power of exclusion far from the jail's administrators, leaving it up to several rotating, relatively low level mail officers to decide whether a publication is impermissible. Moreover, the policy seeks to facilitate the mail officers' detection of prohibited material by imposing an easy to administer, bright line, standard of "frontal nudity." Consequently, the County's policy falls squarely within the *Thornburgh* Court's admonition that "[a]ny attempt to achieve greater consistency by broader exclusions might itself run afoul of the second *Turner* factor." *Id.* at 417 n. 15, 109 S.Ct. 1874.

No other court has upheld such a broad intrusion into an inmate's First Amendment rights. See, e.g., *Thornburgh*, 490 U.S. at 405 n. 6, 109 S.Ct. 1874 (banning sexually explicit materials involving homosexuality, sadomasochism, bestiality, and children); *Giano v. Senkowski*, 54 F.3d 1050, 1052 (2d Cir.1995) (banning nude or seminude photographs of inmates' wives or girlfriends); *Dawson v. Scurr*, 986 F.2d 257, 259 n. 2 (8th Cir.1993) (regulation prohibiting "material portraying bestiality, sadomasochism, child nudity, or child sexual activity," and several other sexual acts).

Yet the majority appears to believe it has a regulation similar to that recently upheld by a panel majority of the D.C. Circuit in *Amatel v. Reno*, 156 F.3d 192 (D.C.Cir.1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 2392, ___ L.Ed.2d ___ (1999). The Maricopa County regulation is very different. In *Amatel*, the court upheld a federal regulation prohibiting material that is "sexually explicit" or "features nudity." The Bureau of Prisons adopted a definition of "features nudity" that is much narrower than Maricopa County's standard: "'features' means that 'the publication contains depictions of nudity or sexually explicit conduct on a routine or regular basis or promotes itself

based upon such depictions in the case of individual onetime issues.'" *Amatel*, 156 F.3d at 194. More significant, however, is that the regulation in *Amatel* expressly provides for an exception to the ban on material that features nudity "if it contains 'nudity illustrative of medical, educational, or anthropological content.'" *Id.* Accordingly, the *Amatel* court acknowledged that the regulation prohibited only "pornography." *Id.* at 199 ("The legislative judgment is that pornography adversely affects rehabilitation."); *id.* ("We think that the government could rationally have seen a connection between pornography and rehabilitative values.").[1]

Maricopa County's regulation proscribes much more. This record demonstrates that prison officials would ban a photograph of a nude Christ painted by Michelangelo. *See Mauro v. Arpaio*, 147 F.3d 1137, 1143 (9th Cir.1998). The D.C. Circuit in *Amatel* observed that "[w]e find it all but impossible to believe that the *Swimsuit Edition* and *Victoria's Secret* pass muster while Michelangelo's *David* or concentration camp pictures fail; nor has there been any suggestion that any prison official has attempted to implement such a bizarre interpretation." 156 F.3d at 202. The record in this case establishes the very facts that the *Amatel* court found "all but impossible to believe."

Moreover, the sole justification offered by the federal prisons in *Amatel* for their regulation was inmate rehabilitation. Here, however, the plaintiff is a pretrial detainee who has not yet been convicted of any crime. Just as the County has no legitimate interest in his punishment, *see Bell v. Wolfish*, 441 U.S. 520, 535-36, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), neither can it have a legitimate interest

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[1] "Pornography" is defined as "material (as books or a photograph) that depicts erotic behavior and is intended to cause sexual excitement." Webster's New Collegiate Dictionary 888 (1979).

in his rehabilitation. *See McGinnis v. Royster*, 410 U.S. 263, 273, 93 S.Ct. 1055, 35 L.Ed.2d 282 (1973) ("[I]t would hardly be appropriate for the State to undertake in the pretrial detention period programs to rehabilitate a man still clothed with a presumption of innocence."); *United States v. Hearst*, 563 F.2d 1331, 1345 n. 11 (9th Cir.1977) (observing that a pretrial detainee can "assert his status as a shield" against jail policies aimed at rehabilitation). The majority appropriately recognizes that the County's goal of rehabilitation is not legitimate as applied to pretrial detainees, but dismisses any concern simply by noting that the County's jails house "a mix of pretrial detainees and convicted inmates."

The County did not rationalize its reliance on rehabilitation by arguing that some of its jail's residents are convicted inmates. Quite the contrary, the County has consistently argued to this court that the brief stay of its inmates, an average of 13.6 days, is a consideration that favors the regulation's validity. The thrust of the County's argument is that this regulation can rehabilitate inmates who on average spend just two weeks in its jails.

The County even stresses that its goal of rehabilitation is aimed at pretrial detainees. It explains that the regulation is intended "to prevent the introduction of sexually explicit materials into an environment where 10-20% of all inmates *are facing charges* involving sexual offenses." (emphasis added). It apparently matters not to the County that inmates "facing charges" are presumed innocent and cannot be the subject of rehabilitative efforts. The fact that the County argues to this court that its regulation advances an illegitimate interest in rehabilitation merely underscores the lack of rationality behind the regulation. Furthermore, because the County in this case cannot invoke rehabilitation as a justification for the policy, *Amatel* provides none of the support the majority would draw from it.

In fact, the regulation upheld in *Amatel*, while less intrusive than the regulation we have before us, is not itself free from constitutional doubt. That regulation prompted an eloquent dissent from Judge Wald:

> Claims of prisoners to read magazines like *Playboy* or *Penthouse* may not be the ideal vehicles for the articulation of First Amendment rights. But, as Dostoyevsky observed, "the degree of civilization in a society is revealed by entering its prisons." F. DOSTOYEVKSY, THE HOUSE OF THE DEAD 76 (C. Garnett trans., 1957). Today's ruling that prisoners may be stripped of rights to view publications of their choice on the mere assertion of legislators or regulators-far removed from the prison scene and without supporting evidence of any kind-that those publications will hinder their "rehabilitation" goes well beyond prior precedent and the case law in other circuits. It is a most troubling precedent.

Amatel, 156 F.3d at 214 (Wald, J., dissenting).

The majority assumes that prison inmates, including pretrial detainees like Mauro who have been convicted of no crime, are demeaned individuals who would prefer to see trash rather than art and whose First Amendment rights therefore will not be affected. This assumption is without precedent and diminishes our constitutional protections.

B. FLETCHER, Circuit Judge, dissenting:

I concur fully in Judge Schroeder's dissenting opinion. The regulation at issue prohibits material ranging from art books displaying Michelangelo's *David* to issues of *Sports Illustrated* depicting male Olympic swimmers. As Judge Schroeder amply demonstrates, such a prohibition is of unprecedented breadth and cannot pass constitutional muster.

The majority's attempt to avoid this infirmity by adopting an unduly narrow reading of the regulation is without support either in the text of the regulation or in the County's expressed understanding of the regulation.[1]

I also agree with Judge Kleinfeld that on the specifics of this case, summary judgment should not have been granted for the County. As Judge Kleinfeld rightly points out, the County may not attempt to "reform" or "punish" pretrial detainees. *See Bell v. Wolfish*, 441 U.S. 520, 535, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). The majority responds that Mauro did not raise the issue of whether the regulation is imposed for the purpose of punishing pretrial detainees, and that he has therefore waived it. *See* Majority Opinion at 10 n.2. In so concluding, the majority ignores the essence of Mauro's suit. Throughout this case, Mauro has referred to himself as a pretrial detainee. In addition to challenging the regulation as facially overbroad, he challenges the application of the regulation to him. By claiming that the regulation may not validly be applied to him, Mauro necessarily contends that the purpose of the regulation does not justify its application to him. That is, he claims that the purpose of the regulation does not justify its application *to a pretrial detainee*. Only by ignoring the obvious fact, reflected in the record, that Mauro is (or was at the relevant time) a pretrial detainee can the majority conclude that he has waived the claim most central to his suit.

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[1] The Deputy Chief of the Maricopa County Custody Bureau confirmed the breadth of the regulation in his deposition:

Q: So if somebody was just topless with their bottom covered and that was depicted in a photograph or picture, that would be considered frontal nudity?

A: Yes.

Q: And it doesn't distinguish between male or female nudity, correct?

A: Correct.

Last, I agree with Judge Kleinfeld that conventional jail and prison disciplinary measures--unit segregation, full restriction, and reclassification--are more appropriate responses to the harassment of female guards by inmates. The county of course has a legitimate interest in preventing the harassment of its employees. But by choosing to ban such an astonishingly broad range of material, the county imposes a substantial and unjustifiable burden on the First Amendment rights of even those who have no history of harassment, and who have not yet been convicted of any criminal offense. Such an imposition is totally out of proportion to the problem at hand.

The majority apparently concludes that the First Amendment does not protect the right of, for example, a nonviolent, non-harassing pretrial detainee to pursue his general equivalency diploma by reading a Western Civilization textbook containing a chapter on the art of the Renaissance. Surely the Constitution's prohibition on laws "abridging the freedom of speech," U.S. Const. amend. I, means more than that. Because the majority concludes it does not, I respectfully dissent.

KLEINFELD, Circuit Judge, with whom Judge B. FLETCHER, Circuit Judge, partially joins, dissenting:

Mauro is a pretrial detainee. As of the time covered by the record in this case, he had not been convicted of the crime for which he was being held. He evidently waited two years in the county jail for his trial.[1] This case in-

[1] It may be that, were the record to disclose current circumstances, we would have to take notice that Mauro lacks standing, so there is no case or controversy. It seems doubtful that he is still a pretrial detainee in the Madison Street Jail. But the record has nothing in it to indicate the absence of standing.

volves his rights prior to conviction. He has some experience in various jails, and has been accustomed to reading *Playboy, Penthouse, Time, Newsweek*, and newspapers while in jail. There is no evidence in the record that he has used any of these publications in any of the inappropriate ways described in the majority opinion, and he testified in his deposition that he has not. He says in his deposition that he likes to read *Playboy* for the articles. This case arises from his being turned down on a request that he receive his *Playboys*.

My guess is that at the end of the day, the majority will turn out to be correct, that the jail can ban publications showing frontal nudity, in order to maintain security and discipline. But we are not yet at the end of the day. A person's rights should not be taken away on the basis of a guess. There is a genuine issue of material fact. The case was dismissed on summary judgment, without a trial, so a genuine issue of material fact requires reversal. The issue of fact is whether the ban was imposed to preserve jail security and discipline, or for purposes of punishment. There is evidence in the record that the reason why the jail excludes publications with frontal nudity is to punish the prisoners. If so, the ban is unconstitutional. "[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."[2] There was also evidence that the jail excluded publications showing frontal nudity to maintain order, and that it was not excessive in relation to that purpose. If so, the ban is probably permissible. A trial is the way to find out.

The majority overlooks the issue of fact because it uses the wrong case as a source of the controlling rule. The majority uses the rule from *Turner v. Safley*, "reasonably

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[2] *Bell v. Wolfish*, 441 U.S. 520, 535, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

related to legitimate penological interests."[3] That rule applies to prisons, which impose punishment upon people who have been convicted of crimes. We should use the rule from *Bell v. Wolfish*, that a jail restriction is unconstitutional if it is imposed for purposes of punishment, but is constitutional if it is "but an incident of some other legitimate governmental purpose," such as to assure that the individual will be present for his trial, or "to maintain security and order at the institution." There is a genuine issue of fact under the rule in *Bell*, even though there is not under *Turner*. That is because "legitimate penological interests" include punishment. That purpose generally validates a rule for convicted prisoners, but invalidates it for pretrial detainees.

"Prisons" and "jails" are not the same things. Jails hold people pending trial, and for short punitive sentences after conviction.[4] Prisons hold people convicted and sentenced to substantial incarceration, ordinarily for felonies.[5] The case before us is a jail case, not a prison case. The plaintiff was being held to await his trial, in the Madison Street Jail, one of several in the Maricopa County jail system. I have not found anything in the briefs and excerpts of record to show that any of the prisoners in the Madison

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[3] *Turner v. Safley*, 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987).

[4] Black's Law Dictionary 834 (6th ed.1990) (jail is "[a] place of confinement that is more than a police station lockup and less than a prison. It is usually used to hold persons either convicted of misdemeanors (minor crimes) or persons awaiting trial or as a lockup for intoxicated and disorderly persons.").

[5] Black's Law Dictionary 1194 (6th ed.1990) ("[t]he words 'prison' and 'penitentiary' are used synonymously to designate institutions for the imprisonment of persons convicted of the more serious crimes, as distinguished from reformatories and county or city jails.").

Street Jail have been convicted of the crimes for which they are being held, although the county jail system as a whole of course houses both pretrial detainees and persons convicted of crimes. The county can punish convicted inmates, and can restrict First Amendment rights of pretrial detainees to maintain order in the jail, but it cannot punish pretrial detainees or take away First Amendment right of pretrial detainees to maintain uniformity with punishment rules for convicted criminals in other facilities.

Although the majority concedes in footnote 1 that a prison regulation cannot be adopted for the purpose of punishing and rehabilitating pretrial detainees, its application of the "legitimate penological interest" test allows exactly that. "Penological" means relating to the "theory and practice of prison management and criminal rehabilitation."[6] The word is derived from the Greek and Latin words meaning penalty or punishment, and still means roughly the same thing.[7] *Turner*, after formulating the test, expressly treats rehabilitation as a legitimate penological interest in its holding regarding a prohibition against inmate marriages.[8]

Our disagreement on which rule to apply has substantial practical significance for this case, because there is evidence that the reason why the jail prohibits Mauro from receiving *Playboy* is to punish him. Under *Bell v. Wolfish*,[9] Mauro is entitled to defeat the restriction if he can show either of two propositions to be true, an express intent to

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[6] *Am. Heritage Dictionary* 918 (2d college ed.1985).

[7] *Id.*

[8] *Turner v. Safley*, 482 U.S. 78, 97-99, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987).

[9] *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

punish, or a purpose of punishment that can be inferred from excessiveness of the restriction in relation to the legitimate purpose assigned to it:

> A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].[10]

Thus the question for us is whether the record establishes a genuine issue of fact on either of these two questions. If it does, Mauro is entitled to try to prove his case.[11]

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[10] *Bell*, 441 U.S. at 538, 99 S.Ct. 1861 (internal citations and quotations omitted).

[11] The majority opinion argues that whether the policy at issue was imposed for the purpose of punishing pretrial detainees "was not raised by the parties in their briefs" so has been waived. Mauro's brief broadly challenges the constitutionality of the policy on all grounds. The parties dispute the legitimacy of the purpose of the policy. Mauro's brief discusses the Penthouse interview with Sheriff Arpaio "in which he stated that the purpose behind prohibiting sexually explicit magazines was to 'punish' jail inmates." The brief for the sheriff and the county argues that the ban had three purposes, "eliminating workplace discrimination" against female detention officers, "rehabilitation," and "to prevent fights among inmates." The brief argues that "rehabilitation of inmates is clearly a legitimate penological interest." The penological interest of rehabilitation is identical to that of punishment, in that it is constitutionally limited to people who have been convicted of crimes. I therefore do not agree that the punishment aspect of the case "was not raised by the parties in their briefs."

Mauro had evidence sufficient to establish an issue of fact material to both *Bell* questions, though he only needed evidence on one. First, he produced evidence of what *Bell* phrases as "an expressed intent to punish on the part of detention facility officials."[12] Sheriff Arpaio, who runs the jail, said, in one of the exhibits submitted in opposition to summary judgment, that his purpose in keeping sex magazines out of the jail was to punish the prisoners:

> I don't think you should live better in jail than on the outside.... They shouldn't be country clubs. No Club Fed in my jails. When you go to jail you should have to give up certain things--smoking, coffee, *adult magazines*, and R-rated movies. *Jail means punishment.* ... This is my jail and *they stay here until they're convicted and sent to state prison*.... I've seen some of them interviewed on national television, saying they'll sign plea agreements just to get out of my jail and be sent to prison.[13]

It is hard to imagine better evidence that the purpose of a restriction is punishment than the man who runs the jail saying that his pretrial detainees "should have to give up ... adult magazines" because "jail means punishment." And the sheriff uses careful and precise phrasing to make it clear that he is talking about pretrial detainees, not convicted criminals.

Arguably this quotation is not cognizable evidence under Rule 56(c) and (e) because it may be inadmissible hearsay. I cannot tell from the excerpts of record we have whether that is so. Probably the statement is an admission

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[12] *Bell*, 441 U.S. at 538, 99 S.Ct. 1861.

[13] Exhibit E to plaintiff's motion for preliminary injunction, Allan Sonnenschein, *Sheriff Joe Arapaio*, *Penthouse*, January, 1995, at 87, 134 (emphasis added).

so not hearsay as to the defendant's own words.[14] But the statement may be inadmissible hearsay by the reporter who purported to quote Sheriff Arpaio saying these words.[15] I do not know whether Sheriff Arpaio has admitted the accuracy of the quotation,[16] or whether a declaration by the reporter has been filed saying that the sheriff used these words. The district judge did not reach the question. Admissibility of this critical evidence ought to be ruled on in the district court.

Even without the sheriff's admission, Mauro has established a genuine issue of fact material to the second *Bell* criterion, "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]."[17] The Supreme Court did not say "excessive in relation to the burdens of being in jail generally"—for a jail inmate, being deprived of *Playboy* is among the less substantial interferences with his liberty. The excessiveness is to be measured in relation to the legitimate purpose of maintaining order in the jail. If the restriction is excessive in relation to that legitimate purpose, that is evidence that it serves a punitive purpose, which is not legitimate as to people not yet convicted of the crime for which they are jailed.

The papers submitted on the summary judgment motion would enable a jury to conclude that the prohibition of publications showing frontal nudity was excessive in relation to

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[14] Fed.R.Evid. 801(d)(2).

[15] *Larez v. City of Los Angeles*, 946 F.2d 630 (9th Cir.1991).

[16] *Cf. Masson v. New Yorker Magazine, Inc.*, 85 F.3d 1394 (9th Cir.1996).

[17] *Bell*, 441 U.S. at 538, 99 S.Ct. 1861.

the purpose of maintaining order, and was adopted for other purposes, including punishment and public relations. The memorandum written by the deputy chief of the custody bureau to the sheriff to justify the policy lists several purposes other than and in addition to maintaining order. Among them are that "morally we should not provide this material to those people" (referring to people charged with sex crimes), and "[f]ederal law requires that if a female employee makes a complaint regarding what she considers obscene, that we as employers must ensure this material is removed." The memorandum also discusses the public relations aspect of presenting the ban to reporters, noting that "[t]he newspaper may bring up the fact that the Arizona State Prison system allows both smoking and sexually explicit material to its prisoners." The moral rehabilitation of the prisoners must, of course, await their convictions.

As the majority opinion sets out, some prisoners did disgusting things using sexually oriented magazines as props, to harass female guards. So far as the record indicates, the plaintiff never did. The harassment by other prisoners does not establish that banning the magazines is not excessive relative to the goal of maintaining order. Every single one of the harassing actions by inmates was plainly prohibited by the jail discipline code. The jail has express rules against "engaging in sexual acts," "making sexual proposals or threats," "indecent exposure," "refusing to obey direct orders from M.C.S.O. staff," "assault on employee," "fighting," and "conduct which disrupts security or operation of institution," among others. The penalties are substantial-- typically disciplinary segregation, full restriction, and reclassification. Indecent exposure, engaging in sexual acts, making sexual proposals, are all subject to restriction, unit segregation and other sanctions. These sanctions can be imposed by means of a simple internal discipline procedure, without the burden of proving criminal charges.

Yet the jail banned the magazines and other materials for everyone, instead of punishing the people who used them as props with which the harass the guards. Though the inmates could not be punished for the crimes with which they were charged until they were convicted in court, they could be punished for discipline violations after relatively informal discipline proceedings in the jail. Punishment of malefactors is the traditional means of preventing people from misusing their liberties while leaving the liberties intact for those who do not misuse them. One inmate whose conduct was especially egregious was charged with a crime, but so far as the record indicates, the jail discipline system was never used to deal with the violative uses of sexual magazines by prisoners.

The reason jail personnel gave for not using the discipline system was that there were too many violations and the jail stays were too short. That reason is necessarily speculative where discipline proceedings charges were not even attempted. Even though all the drivers on an expressway may be going twenty miles an hour over the speed limit, it will probably not be necessary to ticket more than a few to get the rest to slow down. Likewise for more serious offenses such as the prisoners' disorderly use of sexual magazines, punishment of a few may deter the rest. The liberty at issue, a First Amendment liberty to read (and of publishers to have access to readers[18]) is a substantial one, especially where it involves people whom the state holds as prisoner but who have not yet been convicted of crimes. Ironically, the prisoners could not read the *Penthouse* interview of the sheriff because it appeared in a publication that shows frontal nudity. It may be that trial would lead to a finding of fact that, without evidence that the discipline

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[18] *Thornburgh v. Abbott*, 490 U.S. 401, 408, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989) ("publishers ... have a legitimate First Amendment interest in access to prisoners").

system had been tried and failed, a total ban was excessive relative to its legitimate purpose. (Or it might be that it would not—the case could go either way on the evidence in the record so far). There is enough here to allow the plaintiff to get the question to trial.

A related question on which there is a genuine issue of fact is whether the ban works. If the ban on sexual magazines is not a reasonably effective means for preventing inmates from fighting, harassing guards, and otherwise disrupting the good order of the jail, then the ban is excessive relative to that purpose. A ban on an exercise of a constitutionally protected liberty, to serve a permissible purpose, is excessive relative to that purpose if it does not effectively serve it. The depositions indicate that inmate sexual harassment of female guards has continued, despite the ban on sexual magazines, though some guards say it has declined. The evidence that inmates use sexual magazines as props to harass female guards, described in the majority opinion, does not show that banning sexual magazines prevents inmates from sexually harassing female guards. Many of the people who get thrown in jail are likely to act inappropriately with or without sexually oriented magazines. And considering that most people in jail are young males, they are likely to have sexual thoughts about their guards, if the jail uses female guards. Because the jail uses female guards for male prisoners, and because inmates in jail must give up their privacy in order to facilitate security, the female guards are going to see the prisoners doing things that are ordinarily not done in front of people of the opposite sex, or in front of anyone at all. A trial could go either way on whether the ban on publications, pictures from wives and girlfriends, and other material showing frontal nudity, serves the purpose of maintaining order in the jail or is excessive relative to that purpose because of ineffectiveness.

We have not reached the question whether publications showing frontal nudity may be kept from pretrial detainees in jail because of jail administrator's concerns that "[f]ederal law requires that if a female employee makes a complaint regarding what she considers obscene, that we as employers must ensure this material is removed." Defendants argue in their brief that preventing "hostile environment" in a workplace is a "compelling" government interest that justifies a ban on possession of sexually oriented speech. This rationale, of course, is not limited to jails.[19] The argument would justify a government ban on possession of publications showing frontal nudity in any workplace, whether they are displayed to anyone or not. I am not so sure that the Supreme Court decisions allowing limitations on the rights of pretrial detainees to preserve order in the jail include this radical extension of sexual harassment law. The guards' workplace is the inmates' residence, and it is an unanswered question that would benefit from development of a record whether unconvicted individuals in pretrial custody must give up their liberty to read what they like in order to accommodate the guards' interest in the absence of sexually offensive material at their workplace. It is one thing for the jail to ban offensive sexual displays that may drive some women from the workplace, and another to ban receipt and possession even without display. The ban here is on receipt of publications, pictures of wives and girlfriends, and other materials that include frontal nudity, not on display of those items to guards or other improper use of them. The harassing displays and improper uses are prohibited by the discipline rules. That possession of these publications may offend does not justify banning them. "The States, acting as guardians of public

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[19] *See generally*, Eugene Volokh, *Freedom of Speech and Appellate Review in Workplace Harassment Cases*, 90 Northwestern Univ. L.Rev. 1009 (1996).

morality" may not prohibit speech merely on the basis that it is offensive.[20] The harassment, as opposed to the offense, is caused by display of the magazines in a purposely harassing manner, but the regulation at issue goes to their receipt and possession even by those who do not engage in such conduct, such as the plaintiff.

As I said earlier, my speculation, as yet unsupported by facts because there has been no trial, is that the majority will turn out to be right in its result. Jails can be rough places, and need some blunt tools to make the prisoners behave themselves while they are there. The jail may well be able to show that nearly all the items showing frontal nudity that come in are sex magazines and photographs of wives and girlfriends, and that the inmates fight and otherwise disrupt the good order of the jail if these are allowed in, no matter what the jail tries to do about discipline. On the other hand, the majority may be wrong. The evidence might establish that the purpose of the ban on frontal nudity pictures is to punish the prisoners and rehabilitate them, as is proved by express declarations or excessiveness relative to the goal of preserving order in the jail. A trial is a good way to find out. Arizona has to convict these people before it is entitled to punish and rehabilitate them. We must not follow the Red Queen's injunction, "sentence first--verdict afterward."[21]

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[20] *Cohen v. California*, 403 U.S. 15, 22-23, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971).

[21] Lewis Carroll, *Alice's Adventures in Wonderland* 146 (Random House 1946).

APPENDIX B

Jonathan D. MAURO, Plaintiff-Appellant,

v.

Joseph M. ARPAIO, Sheriff; Maricopa County, a political subdivision of the State of Arizona, Defendants-Appellees,

Arizona Civil Liberties Union, Intervenor.

No. 97-16021.

United States Court of Appeals,

Ninth Circuit.

Dec. 2, 1998.

Prior report: 147 F.3d 1137

ORDER

Upon the vote of a majority of nonrecused regular active judges of this court, it is ordered that this case be reheard by the *en banc* court pursuant to Circuit Rule 35-3. The three-judge panel opinion, *Mauro v. Arpaio*, No. 97-16021, slip op. at 10013 (9th Cir. Sept. 1, 1998), is withdrawn.

APPENDIX C

Jonathan D. MAURO, Plaintiff-Appellant,
v.
Joseph M. ARPAIO, Sheriff; Maricopa County, a political subdivision of the State of Arizona, Defendants-Appellees.

Arizona Civil Liberties Union, Intervenor.

No. 97-16021.

United States Court of Appeals,

Ninth Circuit.

Argued and Submitted April 17, 1998.

Decided July 2, 1998.

As Amended Sept. 1, 1998.

Nicholas S. Hentoff, Phoenix, Arizona, for plaintiff-appellant.

Daniel P. Struck, Jones, Skelton & Hochuli, Phoenix, Arizona, for defendants- appellees.

Appeal from the United States District Court for the District of Arizona; Robert C. Broomfield, District Judge, Presiding. D.C. No. CV-95-02729-RCB.

Before: FLETCHER, D.W. NELSON and BEEZER, Circuit Judges.

FLETCHER, Circuit Judge:

Jonathan Mauro appeals the district court's dismissal of his 42 U.S.C. s 1983 claim. The district court held that the Maricopa County prison system's policy prohibiting inmates from possessing "sexually explicit" materials does not violate the First Amendment. The County defines "sexually explicit" material as that containing any graphic

representation of frontal nudity. The district court held that the policy was constitutional both as applied to Mauro's request for *Playboy* magazine and as applied to the receipt of any pictorial representations of frontal nudity. We have jurisdiction, 28 U.S.C. s 1291, and we reverse, holding that the policy is unconstitutionally overbroad.

I.

In August 1993 Maricopa County adopted a policy prohibiting inmates from possessing "sexually explicit" materials. Appellant Jonathan Mauro, a pretrial detainee, sought to receive a subscription to *Playboy* while housed at one of Maricopa's prisons and was prevented from doing so.

The policy defines sexually explicit materials as "personal photographs, drawings, and magazines and pictorials that show frontal nudity." If a prisoner is found in possession of such items, they are confiscated and the prisoner is "written up" in a Disciplinary Action Report. The "mail officer" has the responsibility for determining whether a particular piece of incoming mail contains sexually explicit material. The position is rotated among detention staff. Thus, different persons on different days will determine whether a particular piece of mail will be withheld.

Maricopa County asserts that its policy was prompted by three considerations: safety, rehabilitation of inmates, and reduction of sexual harassment of female prison personnel. The County produced testimonial evidence that banning sexually explicit materials was necessary to achieve these goals. Affidavits or depositions were submitted from a number of female prison guards; from Larry Wendt, Deputy Chief of the Maricopa Custody Bureau; and from Joseph Arpaio, Sheriff of Maricopa County. In addition, defendants answered written interrogatories and submitted internal prison memoranda regarding the policy. Female

guards noted that such materials were used to intimidate and harass them. The Deputy Chief stated that sexually explicit materials caused "a higher incident [sic] of inmate/officers assaults" and "hurt jail security." A written explanation of the regulation stated that the regulation was guided in part by a desire to insure rehabilitation since a substantial percentage of inmates have been convicted of sexual offenses.

After discovery, both parties moved for summary judgment. Mauro had claimed that the policy violated his rights under several provisions of both the United States and Arizona Constitutions, but both parties stipulated that his federal First Amendment claim would be dispositive. Addressing only the First Amendment issue, the district court granted summary judgment in the County's favor, holding that the policy, though broad, was reasonably related to legitimate penological interests. The district court assessed the regulation both as it applied to *Playboy* and as it applied to any depiction of frontal nudity.

II.

We review de novo a grant of summary judgment. *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir.), cert. denied, ___ U.S. ___, 118 S.Ct. 559, 139 L.Ed.2d 401 (1997).

Mauro asserts that the regulation in question is unconstitutional as applied to his *Playboy* subscription and as applied to all materials that depict frontal nudity. The County avers that: (i) its policy does not concern materials protected by the First Amendment; (ii) Mauro cannot bring a facial challenge to the regulation, and (iii) even if Mauro could bring a facial challenge, the regulation is constitutional as applied to *Playboy* and as applied to any material depicting frontal nudity.

A.

The regulation concerns more than just obscene materials, and thus purports to regulate material that is protected fully by the First Amendment. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 117 S.Ct. 2329, 2347, 138 L.Ed.2d 874 (1997) (holding that sexual expression that is "indecent" is protected by the First Amendment); *BSA, Inc. v. King County*, 804 F.2d 1104, 1107 (9th Cir.1986) (holding that nudity alone is not enough to make material legally obscene).

Defendants assert that it is "doubtful" that the materials banned by its regulation even qualify as protected speech since the materials banned by the regulation "act as discriminatory conduct in the form of a hostile work environment." The County relies on *Roberts v. U.S. Jaycees*, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984), in which the Supreme Court held that where "potentially expressive activities ... produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection." *Id.* at 628, 104 S.Ct. 3244. The Court noted, for example, that an act of violence that has an expressive component is not protected by the First Amendment merely because the act has that expressive component.

In *Roberts*, the Court upheld the application of a Minnesota statute prohibiting gender discrimination in places of public accommodation to the practices of the Jaycees. Club members, who adopted a policy that women could join their organization but could not vote on club matters, claimed that Minnesota's anti-discrimination statute violated their right to associate. The Supreme Court rejected that argument, holding that Minnesota could regulate the specialized harms that flowed from such discriminatory conduct, even if members' rights to associate were impinged in the process.

We disagree that *Roberts* should be applied to cases, like the instant case, that involve pure speech. The County has pointed to no case and we have found none in which any court has applied this "special harms" theory beyond the facts of *Roberts* or the cases that involve regulation of violent behavior. *Roberts* has been cited exclusively in cases with very similar facts, *i.e.*, where the rights of social club members to associate with each other run afoul of anti-discrimination laws. We decline Maricopa's invitation to expand the application of *Roberts*.

B.

Defendants next contend that Mauro is limited to challenging the regulation as it applies only to *Playboy* since Mauro conceded at deposition that he has tried only to receive a subscription to *Playboy* while in jail and his administrative grievance to jail authorities concerned only his *Playboy* subscription. Mauro may challenge the regulation as it relates to other materials only if he has standing to bring a facial overbreadth challenge to the regulation.

A facial overbreadth challenge may be brought to protect the First Amendment rights of those not before the court. The County correctly notes that the Supreme Court has held that "facial overbreadth adjudication is an exception to ... traditional rules of practice." *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). *Broadrick* describes a number of situations in which facial challenges are or are not appropriate. For example, a facial challenge is not appropriate when a plaintiff challenges an "ordinary criminal law." *Id.* at 613, 93 S.Ct. 2908. Also, when a statute regulates conduct that sometimes contains elements of expression, an overbreadth challenge is appropriate only when the overbreadth of a statute is real and substantial. *Id.* at 615, 93 S.Ct. 2908; *see also United States v. Stansell*, 847 F.2d 609, 613 (9th Cir.1988) (holding that "if a statute covers both conduct

and speech ... the Supreme Court requires that 'the overbreadth of a statute must not only be real, but substantial as well' " (emphasis added)). On the other hand, facial challenges are particularly appropriate where a statute regulates "only spoken words," implicates the right of association, or acts as a prior restraint. *Broadrick*, 413 U.S. at 612- 13, 93 S.Ct. 2908.

Maricopa County urges us to apply *Broadrick* to deny standing to Mauro to bring a facial challenge because Mauro has not shown that the regulation is substantially overbroad. The County contends that given the reality of prison life, it is "unlikely" that prisoners would request the type of art magazines and other materials that Mauro suggests would be banned by the regulation. First, we disagree that the regulation is not substantially overbroad. A wide variety of magazines and materials contain some frontal nudity, and pursuant to the regulation, inmates would be prevented from having any photograph, drawing or graphic that depicted frontal nudity. As noted by Mauro, this would include such magazines as *National Geographic*, medical journals, artistic works, and countless other materials. Second, although this is not a classic prior restraint case, as the regulation operates, inmates are prevented from receiving any materials that contain nudity, even those that cannot be legally withheld. If an overbreadth challenge is not allowed, inmates will be forced to endure an unending series of legal challenges to determine whether the regulation imposes a ban, piece of mail by piece of mail, while their First Amendment rights are put on hold. This is not a case in which the possibility is remote that parties not before the court would be punished for expressive conduct that is protected by the First Amendment. *See, e.g., Regan v. Time, Inc.*, 468 U.S. 641, 650-51, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984) (noting that an overbreadth challenge was inappropriate where there existed a remote possibility that a statute would be applied to persons who were engag-

ing in protected activity). Rather, this is a case in which materials will be withheld as a matter of course, forcing the inmates to bear the burden of uncertainty until more cases are litigated. We conclude that Mauro has standing to bring a facial challenge.

C.

Prisoners do not lose their constitutional rights merely because they are incarcerated, although such freedoms are limited necessarily by the context of their surroundings. *See Procunier v. Martinez*, 416 U.S. 396, 409-13, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974). In *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), the Supreme Court held that, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89, 107 S.Ct. 2254. The Court recognized that while "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," federal courts are " 'ill equipped to deal with the increasingly urgent problems of prison administration.'" *Id.* at 84, 107 S.Ct. 2254 (citing *Procunier*, 416 U.S. at 405-06, 94 S.Ct. 1800). The Court held further that there are four factors to be considered in assessing the reasonableness of a regulation: (i) whether there is a "valid, rational connection" between the regulation and the government interest put forth as justification and whether the purported interest is neutral; (ii) the extent to which alternative means of expression remain open to prisoners; (iii) what impact accommodation of the inmates' rights would have on guards, other inmates, and allocation of prison resources; and, (iv) the absence or presence of ready alternatives. *Id.* at 89-90, 107 S.Ct. 2254 (internal quotations omitted).

There were two regulations at issue in *Turner*. The first prohibited inmates from exchanging correspondence with each other. The Court upheld that regulation, holding

that it was reasonably related to prison safety. The second prohibited an inmate from marrying without permission of the superintendent of the prison.[1] The Court struck the latter regulation, holding that it "swept much too broadly than can be explained by petitioners' penological interests," and that there were easy alternatives that would accommodate an inmate's right to marry while protecting prison security. *Id.* at 98, 107 S.Ct. 2254.

Two years after *Turner* was decided, the Supreme Court reviewed a prison regulation that prohibited prisoners from receiving certain sexually explicit materials, *i.e.*, those containing images of homosexuality, sado-masochism, bestiality, and sexual situations involving children. *Thornburgh v. Abbott*, 490 U.S. 401, 405 n. 6, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989). In upholding the regulation, the Court held that prison regulations prohibiting inmates from receiving certain publications must be analyzed under the *Turner* reasonableness standard, and that the regulation satisfied the test. *Id.* at 413, 109 S.Ct. 1874.

Regardless of whether the County's policy would be constitutional if applied to ban *Playboy* magazine, it is not constitutional to ban all depictions of frontal nudity. There is no appropriate "limiting construction" that may be applied to save the constitutionality of the regulation. Accordingly, we hold that it must be struck as a whole.

1.

The first *Turner* factor combines several inquiries. The government must establish that its justifications are legitimate and neutral and that there is a rational connection be-

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[1] Prison officials claimed that "love triangles" might lead to violent confrontations among inmates and that female inmates would often be better off if they were not involved in abusive marital relationships. *Id.* at 97, 107 S.Ct. 2254.

tween the regulation and the justifications for that regulation.

Maricopa County claims three interests: safety, rehabilitation of inmates, and reduction of sexual harassment. Both the Supreme Court and this court have held that safety and rehabilitation are legitimate penological interests. *See Witherow v. Paff*, 52 F.3d 264, 265 (9th Cir.1995) (citing *Procunier v. Martinez*, 416 U.S. 396, 413, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974)). Although no court has addressed whether reducing sexual harassment of prison guards is a legitimate penological interest, there should be no doubt that protecting the safety of guards in general is a legitimate interest, and that reducing sexual harassment in particular likewise is legitimate. *See, e.g., Folkerson v. Circus Circus Enters., Inc.*, 107 F.3d 754, 756 (9th Cir.1997) (holding that employer may be liable for failing to prevent sexual harassment of employee by co-workers and by private individuals, such as business patrons). We find Maricopa County's interests to be legitimate.

Neutrality has a specific meaning within the context of prison regulations. Neutrality means that:

> the regulation or practice must further an important or substantial interest unrelated to the suppression of expression. Where ... prison administrators draw distinctions between publications solely on the basis of their potential implications for prison security, the regulations are 'neutral' in the technical sense in which we meant and used that term in *Turner*.

Thornburgh, 490 U.S. at 415-16, 109 S.Ct. 1874 (internal quotations and citations omitted); *see also Giano v. Senkowski*, 54 F.3d 1050, 1055 (2d Cir.1995) (holding that "even content-based First Amendment restrictions have been treated as neutral if their sole purpose is to maintain prison security and decrease violence among inmates");

Dawson v. Scurr, 986 F.2d 257, 261 (8th Cir.1993) (holding that prison regulations which "distinguish between publications on the basis of their potential implications for prison security and rehabilitation ... are 'neutral' ").

Here, the regulation purports to distinguish among incoming mail and publications based upon the materials' potential effect on prison safety, not based upon a certain message contained within that material. *See, e.g., Harper v. Wallingford*, 877 F.2d 728, 733 (9th Cir.1989) (holding that regulation could not ban materials for "merely advocating homosexual activity," but could ban those materials where they are shown to impact prison security). There is no evidence to the contrary. This is all that is required to meet the Turner neutrality test.

In demonstrating that a regulation is rationally related to a legitimate goal, prison officials need not prove that the banned material actually caused problems in the past, or that the materials are "likely" to cause problems in the future so long as there is an "intolerable risk" of violence. *See Thornburgh*, 490 U.S. at 417, 109 S.Ct. 1874 (so holding); *Casey v. Lewis*, 4 F.3d 1516, 1521 (9th Cir.1993) (holding that the court needs no proof that the banned materials had ever been the cause of violence in the past); *Harper v. Wallingford*, 877 F.2d 728, 733 (9th Cir.1989) (holding that prison need not demonstrate proof of actual danger). Rather, prison officials may anticipate problems and adopt regulations to forestall them. *Casey*, 4 F.3d at 1521 (citing *Turner*, 482 U.S. at 89, 107 S.Ct. 2254).

On the other hand, courts have not allowed prison officials to enact broad and far-reaching bans simply because safety or other legitimate interests were purported concerns. For example, as noted previously, the Court in *Turner* struck a prison regulation that prevented inmates from marrying "civilians." The Court noted, "the rule sweeps much more broadly than can be explained by petitioners' pe-

nological interests." *Turner*, 482 U.S. at 98, 107 S.Ct. 2254. The Court was concerned that prison officials' stated rationale was inconsistent with previous policy and not well supported by their own testimony. For example, there had been a long tradition of allowing such marriages, the rule had been unevenly enforced as applied to male and female inmates, and prison officials themselves had testified that they generally had no problem with inmate-civilian marriages. *Id.* at 99, 107 S.Ct. 2254.

In *McCabe v. Arave*, 827 F.2d 634 (9th Cir.1987), this court struck in part a prison regulation which prevented prisoners from receiving materials from the Church Jesus Christ Christian (CJCC). We held that while it was rational for the prison to ban those CJCC materials which specifically advocated violence, the prison could not ban CJCC materials which merely advocated racism, notwithstanding the prison's contention that racist materials are inflammatory and can lead to violence. *Id.* at 638. Some years later, in *Stefanow v. McFadden*, 103 F.3d 1466 (9th Cir.1996), assessing similar literature, we held that a ban is appropriate only when the material is "reasonably likely" to incite violence. *Id.* at 1473. In that case, we held that the book, *Christianities Ancient Enemy*, could be banned from the prison because it specifically advocated violence.

While the County presented evidence that magazines such as *Playboy* had been used in the past to harass female guards,[2] it offers no evidence of past incidents of violence or harassment where other materials depicting nudity were involved. Further, the sole evidence put forth of any potential for future danger was Deputy Chief Wendt's state-

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[2] Female guards stated, for example, that prisoners would hold up such magazines and make anatomical comparisons between them and the persons depicted in the magazines.

ment that it was his opinion that any material depicting nudity could be the focus of violence.

Although prison officials' opinions regarding security threats are owed deference, *see Wallingford*, 877 F.2d at 733, we question whether all materials depicting nudity are "reasonably likely" to be the cause of violence or a tool of harassment absent proof or reasoned explanation that this will result. The deposition of Wendt is the only evidence that Maricopa County offers to this effect, and Wendt offers no rationale for his supposition. After establishing that a photograph of a nude Christ painted by Michelangelo would be banned by Maricopa County's policy, Mauro's attorney asked Wendt the following:

> Q. Do you believe that this photograph would in any way--the possession of this photograph would in any way impact upon jail security?
>
> A. Yes, I do.
>
> Q. Why?
>
> A. There is a possibility that if in one cell you had an inmate or in the same cell you had an inmate who was an atheist and you had another inmate that was a devout Christian, and the atheist said something to the effect that look at the size of the genitals on Jesus Christ, that could incite a fight between the inmates.
>
> Q. All right. Inmates can fight almost over anything, correct?
>
> A. Correct.
>
> Q. I mean, a picture of a clothed Christ could incite a riot, or incite a fight between two inmates?
>
> A. It could.

Q. All right. But yet you don't ban a picture of a clothed Christ, do you?

A. I don't think it has the potion that a picture like this does.

Other than Wendt's testimony, Maricopa County merely states that the possibility that "inmates will misbehave when using materials depicting frontal nudity is clearly a reasonable possibility to which deference toward the policies of jail officials is required." The County offered no expert testimony, *see, e.g., Wallingford*, 877 F.2d at 733 (discussing affidavit of prison psychiatrist), nor even a "reasoned" explanation to support its theories, *see, e.g., Casey v. Lewis*, 4 F.3d 1516, 1521 (9th Cir.1993). At the same time, it imposed a prohibition that went far beyond any sanctioned by this court, or any other.[3] The County has not carried its burden to show that such a far reaching prohibition is "reasonably related" to legitimate penological interests. It offers no proof or reasoned explanation.

2.

The second *Turner* factor concerns whether a regulation leaves open alternative means of expressing the right upon which the regulation impinges. *See Thornburgh*, 490

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[3] Narrow prohibitions on certain types of materials have been upheld. *See, e.g., Thornburgh*, 490 U.S. at 405 n. 6, 109 S.Ct. 1874 (banning sexually explicit materials involving homosexuality, sado-masochism, bestiality, and children); *Wallingford*, 877 F.2d at 729 (banning material from the Man/Boy Love Association promoting sex with children); *Giano*, 54 F.3d at 1052 (banning nude or semi-nude photographs of inmates' wives or girlfriends); *Dawson*, 986 F.2d at 259 n. 2 (banning images of bestiality, sado-masochism, child nudity, and homosexuality).

Maricopa has defined "sexually explicit" as any depiction of frontal nudity. Were the County to define it differently or more narrowly, we would have a different case.

U.S. at 418, 109 S.Ct. 1874. The County's broad regulation fails this alternative means analysis.

The Supreme Court in *Thornburgh* provided useful guidance as to the application of this prong of the *Turner* test. In *Thornburgh*, the prison regulation prohibited any publication that was deemed by the warden to be "detrimental to the security, good order, or discipline of the institution or ... [that] might facilitate criminal activity." 490 U.S. at 416, 109 S.Ct. 1874. While the Court held that the alternative means test was satisfied because inmates retained access to "a broad range of publications," *id.* at 418, 109 S.Ct. 1874, the Court noted that the broader the regulation, the more likely that the regulation will violate the alternative means test. *Id.* at 417 n. 15, 109 S.Ct. 1874. The Court was "comforted" by the fact that "the regulations expressly rejected certain shortcuts," such as the creation of an excluded list of publications, or the delegation of the task of making an issue by issue determination to someone other than the warden himself. *Id.* at 417, 109 S.Ct. 1874. The Court noted that although this might mean that the regulation would at times be applied inconsistently, "[a]ny attempt to achieve greater consistency by broader exclusions might itself run afoul of the second *Turner* factor." *Id.* at 417 n. 15, 109 S.Ct. 1874.

The regulation here forbids any depiction of nudity. There is no issue by issue determination of whether a particular depiction of nudity might cause the unwanted consequences the prison seeks to avoid, nor does the warden have a nondelegable duty to make such an individualized determination. The blanket prohibition unnecessarily precludes prisoners' access to materials fully protected by the First Amendment. The County has not sought to ban a small subset of materials containing obscene of otherwise objectionable nudity while leaving open other means of viewing similar materials. *See, e.g., Giano*, 54 F.3d at

1056 (upholding the constitutionality of a prison regulation prohibiting the possession of nude or semi-nude photographs of loved ones because "commercially produced erotica and sexually graphic written notes from wives or girlfriends are adequate substitutes"); *Dawson*, 986 F.2d at 261 (upholding a regulation that banned certain sexually explicit material, such as child pornography, but that allowed inmates to "keep many sexually explicit materials in their cells"). Rather, in direct contradiction of the Supreme Court's cautionary language in *Thornburgh*, Maricopa County has enacted a regulation that sweeps too broadly, indiscriminately eliminating large categories of materials without individualized consideration.

3.

The third factor weighs an inmate's request that his right be accommodated against the asserted impact that accommodating that right will have on other inmates and prison guards. See *Thornburgh*, 490 U.S. at 418, 109 S.Ct. 1874; *Turner*, 482 U.S. at 90, 107 S.Ct. 2254 (holding that "[i]n the necessarily closed environment of the correctional institution, few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources for preserving institutional order"). Maricopa County has failed to address this issue except to insist that allowing inmates access to any depiction of frontal nudity would have a negative impact on jail security. We have rejected this broad claim, and in any event, have no need to address this factor, finding that the regulation fails to meet other prongs of the *Turner* test.

4.

The availability of "obvious, easy" alternatives that could be implemented at a "de minimis" cost weigh against the reasonableness of a regulation. *Turner*, 482 U.S. at 93, 107 S.Ct. 2254. Mauro does not allege to this court that

there are readily available alternative means of allowing him to view the materials he seeks to view. We have no ability nor need, then, to evaluate this prong of the *Turner* test.

III.

Because we find that the regulation is overbroad, we must determine whether we can narrow the regulation in such a way as to insure its constitutionality. *See Broadrick*, 413 U.S. at 613, 93 S.Ct. 2908 ("Facial overbreadth has not been invoked when a limiting construction has been or could be placed on a challenged statute."); *BSA, Inc. v. King County*, 804 F.2d 1104, 1110 (9th Cir.1986) (holding that "the court must determine whether there is a 'readily apparent construction ... for rehabilitating the statute'" (citation omitted)).

Neither party has suggested an appropriate limiting construction, and we find that none exists. Maricopa has banned all depictions of frontal nudity. Such a broad restriction is not subject to an appropriate limiting construction and this court has neither the ability nor the power to fashion an entirely new regulation. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 117 S.Ct. 2329, 2351, 138 L.Ed.2d 874 (1997) (holding that courts shall not "rewrite" laws to insure conformance with constitutional requirements, particularly in the absence of clear legislative intent indicating where "a new line or lines should be drawn," even where a severability clause exists). Further, plain and unambiguous regulations, such as the one in this case, are not susceptible to limiting constructions. *See City of Houston v. Hill*, 482 U.S. 451, 468, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987). As the Maricopa County prison regulation is overbroad and not subject to an appropriate limiting construction, we must strike it as a whole.

IV.

Maricopa County's policy impinges upon the right of inmates to receive material protected by the First Amendment. It is overbroad and as such is unconstitutional. We REVERSE the district court and remand for proceedings not inconsistent with this decision. Mauro's request for reasonable attorney's fees pursuant to 42 U.S.C. § 1988(b), is granted. Defendant's request for costs pursuant to Fed. R.App. P. 39 is denied.

REVERSED and REMANDED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

JOHNATHAN D. MAURO, Plaintiff, vs. MARICOPA COUNTY, a political subdivision of the State of Arizona; JOSEPH M. ARPAIO, both individually and in his official capacity as Maricopa County Sheriff, Defendants.	)	No. CIV 95-2729 ORDER

Plaintiff Jonathan Mauro alleges that Defendants' policy of prohibiting inmates' possession of sexually explicit materials in Maricopa County jails violated the First Amendment, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and various provisions of the Arizona State Constitution. The court now considers Defendants' motion for summary judgment and Plaintiff's cross-motion for summary judgment.

I. FACTUAL BACKGROUND

On August 19, 1993, Defendants issued a policy that prohibited the possession of sexually explicit materials by inmates within the Maricopa County jail system (the "Policy"). The Policy defined sexually explicit materials as "materials that show frontal nudity." Under the Policy, sexually explicit materials would be confiscated as contraband and destroyed, and the inmate would be written up on a disciplinary action report. Moreover, a mail officer had the responsibility of determining whether or not a particular

item was "sexually explicit," and the mail officer position was a rotating responsibility among detention staff.

Defendants contend that the Policy was instituted for three reasons: (1) to prevent fights and disturbances by inmates who used the sexually explicit material to barter for "goods" and by inmates who drew anatomical comparisons between the material and the girlfriends or wives of other inmates; (2) to prevent the sexual harassment of female detention officers by inmates who used the sexually explicit materials to threaten, abuse, and intimidate female officers; and (3) to rehabilitate inmates detained on charges of sexual assault, sexual abuse, child molestation or sexual misconduct.

As to the second reason, Defendants contend that, prior to the adoption of the policy, several female detention officers had made complaints about the inmates' possession and use of sexually explicit materials. Inmates would make anatomical comparisons between the sexually explicit photos and the female detention officers.[1] In other cases, inmates who possessed sexually explicit magazines would tell female officers that they wanted to perform sexual acts on them and would masturbate in front of the female officers.[2] Defendants content that this type of sexual harassment of female guards by inmates occurred repeatedly on a daily basis. But, after the institution of the Policy, Defendants

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[1] In the one instance, an inmate held the sexually explicit magazine to the female guard and asked, "What do you think of her? Doesn't she have great breasts? I bet you look that good naked." Other remarks by inmates possessing sexually explicit materials included: "How do you like the tits on this one?" and "How do you like the shaved beaver on this one?"

[2] One particular inmate, while masturbating in his cell, told a female detention officer that he was "fucking Miss July up the ass right now and, when I'm done, I'm going to fuck you up the ass."

allege that the number of incidents of sexual harassment and the number of fights between inmates have dramatically decreased.

Plaintiff Mauro is a pre-trial detainee housed in the Madison Street Jail awaiting trial on charges of fraudulent schemes and artifices. Mauro alleges that he has been injured by enforcement of the Policy when he could not obtain a subscription to *Playboy* magazine on October, 1993. Raising the following arguments, Mauro challenges the constitutionality of the Policy under the First Amendment:

(1) the mail officer in any given day has unbridled discretion to exclude a particular magazine, since the Policy does not provide any guidelines for determining whether a material is "sexually explicit;"

(2) the Policy is overbroad, since it would exclude materials that contain frontal nudity, even though the materials do no contribute to prison violence or the sexual harassment of female detention officers;

(3) the Defendants' stated interest in preventing sexual harassment is not true, since female detention officers are "desensitized" to sexual harassment by inmates; and

(4) there are other less restrictive alternatives than the Policy to preventing fights between inmates or their sexual harassment of female guards.

Both Defendants and Plaintiff have filed a motion for summary judgment. Neither party addresses Plaintiff's Equal Protection and Due Process claims under the Fourteenth Amendment and his claims under the Arizona State Constitution. However, at the hearing on the motions the parties indicated that the court's ruling on their motions would be case dispositive.

II. DISCUSSION

A. STANDARD OF REVIEW

Summary judgment is appropriate where no genuine issue of exists as to any material fact and where the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In determining whether to grant summary judgment, the court will view the facts and inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 577 (1986).

However, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. The requirement is that there be no *genuine* issue of *material* fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A "material fact" is any factual dispute that might affect the outcome of the case under the governing substantive law. *Id.* at 248. A factual dispute is "genuine" if the evidence is such that a reasonable jury could resolve the dispute in favor of the nonmoving party. *Id.*

A nonmoving party cannot rest upon allegations or denials in the pleadings or papers. *Id.* at 250. Instead, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. *Id.* Affidavits establishing such facts must be based on personal knowledge and admissible evidence. Fed. R. Civ. P. 56(c). Moreover, if the nonmoving party's evidence is merely colorable or is not significantly probative, a court may grant summary judgment. *Id.* at 249-50 ("the mere existence of a scintilla of evidence in support of plaintiff's position will be insufficient").

B. First Amendment Challenge to the Policy

1. First Amendment Protects Sexually Explicit Materials

As a threshold issue, the court must first determine whether a policy denying access to non-obscene sexually explicit materials impinges on the First Amendment. Defendants argue that "sexually explicit photographs do not even qualify as protected speech under the First Amendment."[3] The court disagrees. The Supreme Court has expressly stated that non-obscene sexually explicit materials are protected by the First Amendment. *See United States v. X-Citement Video, Inc.*, 115 S. Ct. 464, 469 (1994) (age of minority of performers for purposes of child pornography charge was elemental fact to which scienter requirement of the child pornography statute would be applied, in light of First Amendment protection of non-obscene, sexually explicit material involving performers over age 17). The Ninth Circuit has also held that First Amendment protection extends to such materials. *See BSA, Inc. v. King County* 804 F.2d 1104, 1107 (9th Cir. 1986) (prohibition of a category of protected expression, including that which is sexually explicit, can be upheld only where it furthers a substantial governmental interest unrelated to suppression of free expression, and where governmental interest could not be served by a means less intrusive on First Amendment activity).

Even the cases Defendants cite make clear that sexually explicit non-obscene materials are protected by the First Amendment. In *Barnes v. Glen Theatres, Inc.*, 501 U.S.

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[3] Defendants also argue that sexually explicit photographs "act as discriminatory conduct in the form of a hostile work environment." To the extent Defendants characterize the Policy as regulating conduct, the court disagrees. The Policy prohibits sexually explicit materials, *not* sexual harassment.

560 (1991), the Supreme Court found that nude dancing was expressive conduct protected by the First Amendment. In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Supreme Court impliedly found that adult movies were protected by the First Amendment when they evaluated a zoning ordinance, which restricted the location of adult movie theaters, under the content-neutral time, place and manner test, a test applied to regulations restricting protected expression.

Therefore, the policy denying access to sexually explicit materials does raise First Amendment concerns.[4]

2. First Amendment Rights of Prisoners

Prison walls are not a barrier separating inmates from the protections of the Constitution. *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989). However, the fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment. *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 124 (1977). Moreover, the Supreme Court has counseled judicial restraint in the federal courts' review of prison policy, noting that "courts are ill equipped to deal with increasingly urgent problems of prison administration and reform." *Turner v. Safley*, 482 U.S. 78, 82 (1987).

Accordingly, prison regulations, particularly regulations affecting the sending of a publication to a prisoner, are analyzed under a reasonableness standard. *Id.* at 89; *Thornburgh*, 490 U.S. 413. Such a deferential standard is necessary if "prison administrators ... and not the courts

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[4] Defendants also argue that the Policy would survive constitutional scrutiny even if it was instituted in a non-prison setting. Since the Policy was instituted in a prison setting, the court will not engage in the hypothetical posed by Defendants.

[are] to make the difficult judgments concerning institutional operations." *Turner*, 482 U.S. at 89 (quoting *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. at 128) (internal quotations omitted).

a. *Turner* and *Thornburgh* analysis

Under this standard, the court considers four factors: (1) whether the governmental objective underlying the regulation at issue is legitimate and neutral, and whether the regulation is rationally related to the objective; (2) whether there are alternative means of exercising the right that remain open to prison inmates; (3) the impact that accommodation of the asserted constitutional right will have on others (e.g. guards and inmates) in the prison and on the allocation of prison resources generally; and (4) whether there exists obvious easy alternatives which fully accommodate the prisoner's rights at de minimis cost to valid penological interests. *Turner*, 482 U.S. at 89-91.

(1) Rationally related to neutral, legitimate interests

As to the legitimacy of their interests, Defendants contend that the Policy was enacted to prevent fights among inmates, to prevent the sexual harassment of female detention officers by inmates,[5] and to assist in the rehabilitation

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[5] Plaintiff argues that Defendants' interest in preventing sexual harassment is not legitimate, since the prison is a hostile environment for anyone, and since female detention officers are "desensitized" to sexual harassment by inmates. In support of his argument, Plaintiff cites to Detention Officer Joyce Brown's deposition.

The court doubts that the prison setting is not more hostile to female detention officers who are subjected to sexual slurs from inmates than to male detention officers who are not. Moreover, even if one female detention officer has become desensitized to inmates' harassment, this does not mean that other female guards are not entitled to a workplace free from the type of sexual harassment fostered by sexually explicit materials.

of sexual offenders. The first two interests relate to prison security, and the Supreme Court has held that prison security is a legitimate, and indeed compelling, penological interest. *Thornburgh*, 490 U.S. at 415. Moreover, the Ninth Circuit has held that the rehabilitation of inmates is a legitimate interest.[6] *Harper v. Wallingford*, 877 F.2d 728, 732 (9th Cir. 1989).

As to neutrality, the Supreme Court has held that a regulation was "neutral" if it furthers an important or substantial government interest "unrelated to the suppression of expression." *Thornburgh*, 490 U.S. at 415. Prison security and the rehabilitation of inmates are interests unrelated to the suppression of expression.[7] *See Thornburgh*, 490

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[6] Defendants' evidence supporting their asserted interests in preventing prison fights and fostering the rehabilitation of sexual offenders is sparse. Other than the testimony of Larry Wendt, Deputy Chief of the Custody Bureau, the record does not contain any other evidence of how sexually explicit materials contribute to prison fights and detract from the rehabilitation of sex offenders.

However, since the Supreme Court has mandated that courts afford considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world, this court will accept as true Defendants' above asserted interests. *Thornburgh*, 490 U.S. at 407-408. *See also Harper*, 877 F.2d at 732, (the Ninth Circuit accepted as true defendants' claim that materials advocating consensual sex between adult and juvenile males would threaten prison security based solely on a superintendent's affidavit that such materials could lead to violence).

[7] Citing *Pepperling v. Crist*, 678 F.2d 787 (9th Cir. 1982), and *Thompson v. Patterson*, 985 F.2d 202 (5th Cir. 1993), Plaintiff argues that the Policy is content-based. In *Pepperling*, the Ninth Circuit held that prison officials cannot prevent inmates from receiving magazines solely on the basis that they are "sexually explicit." However, the Ninth Circuit also explicitly stated that it would "not challenge the authority of prison officials to censor specific portions of any magazines ... sent to a prisoner, provided that censorship is based upon a determination that the prisoner's receipt of the publication will have *an adverse impact on either the prisoner's rehabilitation or prison security*." 678

U.S. at 415-16 (where prison administrators draw distinctions between publications solely on the basis of their potential implications for prison security, the regulations are "neutral"); *Harper*, 877 F.2d at 733 (content regulations are permissible in the prison context if the excluded materials pose a threat of violence, a security threat to the prison, or a threat to another legitimate penological interest like the rehabilitation of inmates).

Finally, the court finds that the Policy is rationally related to serving these legitimate and neutral interests. A regulation is not rationally related where "the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Turner*, 482 U.S. at 89-90. Here, the logical connection between excluding sexually explicit materials and preventing problems associated with such materials is not so remote as to render the Policy arbitrary or irrational.

Plaintiff argues that the Policy is not rationally related to Defendants' asserted interests, since it would ban artistic or scientific magazines. Plaintiff argues that the Policy

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F.2d at 791. (emphasis added). Here, Defendants have excluded sexually explicit materials not because of their content, but because they adversely affect the safety and security of other inmates and prison staff.

In *Thompson*, the Fifth Circuit upheld a regulation which excluded publications containing depictions of homosexuality, sadomasochism, bestiality, incest or sex with children. The regulation indicated that publications will not be excluded solely because they have a sexual content. 985 F.2d at 204. Again, the court notes that Defendants in this case did not exclude sexually explicit materials because of their sexual content; rather, they excluded such materials because the materials resulted in fights between inmates and in their sexual harassment of female detention officers by inmates. Moreover, Defendants did not exclude all communications with sexual content; in fact, under the Policy, inmates may continue to read sexually explicit articles, novels or letters.

bans all materials with "frontal nudity" without regard to whether the materials resulted in fights between inmates, in the sexual harassment of female officers by inmates, or had an adverse impact of prisoners' rehabilitation.

However, the court finds that it is not "so remote" a possibility for prisoners to barter nude photographs or drawings in artistic and scientific magazines, to use such photographs to draw anatomical comparisons with wives or girlfriends or other inmates, and to use such photos to sexually harass female detention officers. In fact, the court finds no marked distinction between Plaintiff's Exhibit 1, depicting a live nude female model on the cover of an art magazine, and a photograph of a nude female model in *Playboy*.

Admittedly, all of Defendants' evidence has dealt with the link between magazines like *Playboy* and security or rehabilitation problems, as opposed to the link between magazines like *Art & Auction* or *National Geographic* and these problems. However, the "rationally related" test does *not* require extensive factual proof of the link between the regulation and the government's interests. *Giano v. Senkowski*, 54 F.3d 1050, 1055 (2d Cir. 1995) (making the "common sense determination" that nude photos of wives or girlfriends were highly emotionally charged and often lead to violent altercations among prisoners). Moreover, the "rationally related" test does *not* require an *exact* link between the excluded materials and government interests. *Thornburgh*, 490 U.S. at 410 (rejecting the least restrictive analysis as applied to prison regulations).

Plaintiff argues that the Policy is more restrictive than the regulation in *Thornburgh* which the Supreme Court had found to meet the "rationally related" test.[8] The court

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[8] In *Thornburgh*, the Supreme Court upheld a regulation banning sexually explicit materials which by their nature pose a threat to

agrees. Under the regulation in *Thornburgh*, Plaintiff's *Playboy* magazine would probably have been banned. However, the fact that the Policy is more restrictive that the regulation in *Thornburgh* does not end the constitutional inquiry.

In *Turner*, the Supreme Court indicated that the Constitution "does not mandate a 'lowest common denominator' security standard, whereby a practice permitted at one penal institution must be permitted to all institutions." 482 U.S. at 93 n. 1. Accordingly, the regulation in *Thornburgh* is not the lowest constitutional denominator by which all other prison regulations must be judged. Moreover, while the regulation in *Thornburgh* was aimed at preventing prison violence, here, the Policy is aimed at preventing both sexual harassment and prison violence. Publications which may not contribute to prison violence could conceivably contribute to sexual harassment.

Therefore, the Policy is rationally related to legitimate and neutral interests.

(2) Alternative means of exercising right

In determining whether Plaintiff has an alternative means of exercising his right, "the right" in question must be viewed sensibly and expansively. *Thornburgh*, 490 U.S. at 417. In *Turner*, the Supreme Court upheld a prison regulation which prohibited inmates in one prison from communicating with inmates in other prisons; the Court did not require that prisoners be afforded alternative means of

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security. 490 U.S. at 405. The regulation in *Thornburgh* defined sexually explicit materials to include materials which depicted homosexuality, bestiality, sado-masochism, and sexual acts involving children. *Id.* at 405 n.6. Also, the regulation allowed explicit heterosexual material and any explicit material which has "scholarly, or general social or literary value." *Id.*

communicating with inmates at other institutions in order for the "alternative means" factor to be met. 482 U.S. at 92. Rather, the court merely required that other means of expression remain available, such as inmate communication with non-inmates. *Id. See also Harper v. Wallingford*, 877 F.2d 728, 733 (9th. Cir. 1989) (finding that a regulation which prohibited publications espousing consensual sexual relationships between adult males and juvenile males met the "alternative avenues" factor, even though prisoners had no access to similar materials).

Here, the "right" in question is the right to receive sexually explicit communications, and alternative avenues exist for Plaintiff to exercise this right. Although the Policy bans all sexually explicit publications, it does not ban sexually explicit letters between inmates and loved ones nor does it ban photographs of clothed females or sexually explicit articles. Moreover, to the extent Plaintiff argues that the Policy infringes on his right to read written articles contained within "sexually explicit" magazines, he remains free to read similar articles from different sources. To the extent *Playboy* or *Penthouse* contains "acclaimed fiction, insightful interviews [and] first-rate investigative reporting," and not to the extent Plaintiff reads *Playboy* or *Penthouse* for these articles, he may find equally acclaimed, insightful, and first-rate articles in other magazines.[9] Therefore, the court finds that Plaintiff has alternative avenues of exercising his First Amendment right.

(3) Impact of Accommodation

In determining the impact of accommodating Plaintiff's First Amendment right, the court considers whether ac-

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[9] Defendants also point out that Plaintiff may continue to read written articles contained in sexually explicit magazines by directing his subscription to the house of a family member or friend and having that person in turn forward copies of the non-sexual articles to him in jail.

commodation of this right will have an impact on guards, other inmates, and on the allocation of prison resources.[10] When accommodation of an asserted right will have a significant "ripple effect" on fellow inmates or on prison staff, courts should be "particularly deferential to the informed discretion of correction officials." *Turner*, 482 U.S. at 90. Moreover, where the asserted constitutional right can be exercised only at the cost of significantly less liberty and safety for everyone else, the court should defer to the informed discretion of corrections officials. *Thornburgh*, 490 U.S. at 418.

Here, allowing Plaintiff and other inmates to possess sexually explicit materials would create a "significant ripple effect" on other inmates and on prison staff, since the bartering of sexually explicit materials may lead to fights between inmates, since such fights would jeopardize the safety of staff members who had to intervene as well as the inmates involved, and since sexually explicit materials have contributed to the sexual harassment of female officers. Also, the exercise of Plaintiff's First Amendment right would have a significant impact on prison resources, since detention officers would have to discipline inmates whose use of sexually explicit materials threatened prison security, and since Maricopa County could potentially be liable for

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[10] In *Thornburgh*, the Supreme Court noted that incoming publications would generally have a significant impact on the prison facility:

"Once in the prison, material of this kind reasonably may be expected to circulate among prisoners, with the concomitant potential for coordinated disruptive conduct. Furthermore, prisoners may observe particular material in the possession of a fellow prisoner, draw inferences about their fellow's beliefs, sexual orientation, or gang affiliations from that material and cause disorder by acting accordingly ... The problem is not ... in the individual reading the materials in most cases. The problem is in the material getting into the prison ..." 490 U.S. at 412-13 (internal citations and quotations omitted).

sexual harassment suits from its female detention officers.[11] Finally, the exercise of Plaintiff's First Amendment right would be at the cost of less liberty and safety for other inmates and for prison staff, especially female detention officers.

(4) Obvious Easy Alternatives

The existence of obvious easy alternatives may be evidence that a regulation is not reasonable. *Turner*, 482 U.S. at 90-91. An alternative is "obvious" and "easy" if it "fully accommodates the prisoner's rights at a de minimis cost to valid penological interests." *Id.* Moreover, the Supreme Court has considered the "administrative inconvenience" of the proposed alternative in determining whether it is "obvious" and "easy." *Thornburgh*, 490 U.S. at 419. This factor does not impose a "least restrictive alternative" test; that is, prison officials do not have to "set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." *Id.*

Relying on *Dawson v. Scurr*, 986 F.2d 257 (8th Cir. 1993), *cert. denied*, 510 U.S. 884 (1993), Plaintiff has suggested two alternatives: (1) a reading room for inmates to view sexually explicit materials; and (2) psychological testing of inmates who would be "fit" to receive sexually

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[11] As Defendants point out, courts have found the existence of a hostile work environment where pictures of nude women and sexual slurs abound. *See* EEOC Compliance Manual §614, ¶ 3114 (C) (1) at 3274 (1990). *See also Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991); *Sanchez v. City of Miami Beach*, 720 F. Supp. 974, 977 (S.D. Fla. 1989). Moreover, 29 C.F.R. §1604.11(e) provides that an "employer may ... be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action."

explicit materials.[12] The court finds that both alternatives would impose more than a "de minimis cost" on valid penological interests.

Even if sexually explicit materials were confined to a reading room, there is no evidence that prisoners would not continue to sexually harass female detention officers. Moreover, as Defendants point out, female detention officers, who transported inmates to and from the reading room and who monitored the reading room, would be especially vulnerable to sexual harassment. Finally, the creation of a reading room would certainly be greater than a "de minimis cost;" indeed, it would be administratively burdensome because of the requirement which would be placed on detention officers to escort inmates from different custody levels to and from the reading room, to strip search the inmates

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[12] Defendants also address two other alternatives that the Plaintiff could have raised: (1) separating sexually explicit photographs from "award-winning" articles contained in magazines like *Playboy* or *Penthouse*, and (2) imposing disciplinary sanctions on inmates who barter sexually explicit materials and who sexually harass female detention officers.

As to the first alternative, Defendants note that the Supreme Court in *Thornburgh* upheld the district court's determination that requiring prison officials to tear out the rejected portions of a publication and to admit the rest of the publication would be administratively inconvenient and thus not a "de minimis cost."

As to the second alternative, Defendants argue that individual sanctions would not solve the problems faced by Defendants since: (1) inmates charged with serious felonies are rarely influenced to behave when threatened with sanctions or "write-ups"; and (2) the security and harassment problems created by sexually explicit materials were widespread and frequent and could not easily be eliminated through a case-by-case sanction on a specific inmate.

Based on Defendants' arguments, the court agrees that both alternatives cited above would not be "obvious" or "easy."

once they leave the reading room, and to monitor the reading room.[13]

The psychological testing of inmates also exacts more than a de minimis cost on Defendants' interests. In *Dawson*, the psychological testing of inmates was intended to prevent sexual offenders from receiving sexually explicit materials which would have adversely affected their rehabilitation. 986 F.2d at 260. Psychological testing in this case would not serve the Defendants' other asserted interests in preventing inmate fights and sexual harassment. *Cf. Friend v. Kolodzieckzak*, 923 F.2d 126, 128 (9th Cir. 1991) (inmates' proposed alternative was inadequate where it satisfied some, but not all, of the prison officials' concerns).

Finally, the court reiterates that a prison policy found to be constitutional in one setting does not mean that a more restrictive policy in a different prison setting would be

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[13] Deputy Chief Wendt's affidavit states:

6. . . . [the reading room] is incompatible within the current design structure of the MCSO jails, where inmates are housed at different levels and units according to detailed classification criteria. Simply transporting inmates (from all custody levels) to a central reading room would be a logistical nightmare. Additionally, the current rooms used for attorney and family visitation are already over capacity. To accept Plaintiff's proposal would require the County to spend funds to build an entirely new room or unit with budgetary funds it does not have in its possession and on vacant space that it does not own.

7. The proposal would also impose an administrative burden on detention officers who would be required to transport inmates to and from the room, as well as the inconvenience of the strip-searching of every inmate before they may enter the room. We (MCSO command staff) simply do not have the manpower to provide this extra service for inmates. Even assuming only one percent (1%) of the approximately 6,500 MCSO inmates would want to use the room on a weekly basis, MCSO wold have to escort sixty-five inmates every week to this central reading room. We do not have time or the available staff to accommodate this service.

equally constitutional. This is so, because prisons may have different security concerns due to their available resources and due to the nature and size of their prison population. As Defendants note, the Iowa Board of Corrections policy in *Dawson* applies to a prison facility housing 450 prisoners for an extended period of time. By contrast, the Maricopa County jail system houses 6,000 inmates, and most of the inmates stay for only a short period of time (14 days).

Therefore, under *Turner* and *Thornburgh*, the Policy is constitutional.

b. Standardless discretion

However, the constitutionality of the Policy under *Turner* and *Thornburgh* does not end the constitutional inquiry. The court must still determine whether the Policy confers standardless discretion to detention officers.

A speech regulation that delegates overly broad discretion to a government official is unconstitutional under the First Amendment. The Supreme Court has repeatedly struck down statutes that have vested officials with a dangerously wide and unfettered degree of discretion to regulate speech. *See, e.g., Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (invalidating ordinance requiring marchers to seek permission from town mayor); *Cox v. Louisiana*, 379 U.S. 536 (1965) (striking down standardless breach-of-the-peace statute); *Kunz v. New York*, 340 U.S. 290 (1951) (invalidating ordinance prohibiting public worship without a permit from city police commissioner); *Saia v. New York* 334 U.S. 558 (1948) (invalidating ordinance requiring sound trucks to obtain permission from police chief).

Here, the Policy does *not* confer standardless discretion to mail officers. It clearly defines "sexually explicit materials" as materials depicting "frontal nudity." Whether a

material depicts frontal nudity is an objective test, not a subjective one.[14] Certainly, the Policy in this case conferred less discretion on detention officers than the regulation in *Thornburgh* which allowed the warden to exclude materials "detrimental to the security, good order, or discipline of the institution or ... might facilitate criminal activity." *Thornburgh*, 490 U.S. at 416.

Therefore, the Policy is constitutional under the First Amendment.

IT IS ORDERED granting Defendants' motion for partial summary judgment as to the First Amendment claim (doc. 47).

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[14] In his statement of facts, Plaintiff notes how different detention officers could interpret the Policy differently. During her deposition, Detention Officer Joyce Brown testified that she would let some publications containing frontal nudity into the jail (e.g., National Geographic), because of her subjective determinations regarding the nature and content of the publication. By contrast, another detention officer, Detention Officer Lois McLaughlin, testified during her deposition that she would have excluded the identical material.

However, the Supreme Court has indicated that such inconsistent results do not necessarily raise First Amendment concerns:

> "The exercise of discretion called for by these regulations may produce seeming 'inconsistencies,' but what may appear to be inconsistent results are not necessarily signs of arbitrariness or irrationality. Given the likely variability within and between institutions over time, greater consistency might be attainable only at the cost of a more broadly restrictive rule against admission of incoming publications ... Any attempt to achieve greater consistency by broader exclusions might itself run afoul of the second *Turner* factor, i.e., the presence or absence of 'alternative means of exercising the right' in question ...".

Thornburgh, 490 U.S. at 417 n.15 (internal citations omitted).

IT IS ORDERED denying Plaintiff's cross-motion for partial summary judgment as to the First Amendment claim (doc 54).

APPENDIX E

CONSTITUTIONAL PROVISIONS
(Excerpts)

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1 . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F

MARICOPA COUNTY SHERIFF'S OFFICE INMATE NOTIFICATION (Aug. 6, 1993)

EFFECTIVE IMMEDIATELY, sexually explicit material is no longer permitted within this jail. This includes sexually explicit publications as well as photographs.

All of this material must be disposed of by no later than August 19, 1993. You may eliminate these items from your possession in the following ways:

1. Release items to a visitor during a visit.
2. Mail the items to someone on the outside, at your own expense.
3. Voluntarily dispose of the items by throwing them in the trash container in your housing unit.
4. If you are unable to dispose of the items by using the above three (3) means, you may request, by use of an Inmate Request Form, that your items be placed in temporary safekeeping.

After August 19, 1993, if you are found in possession of sexually explicit materials the items will be confiscated and destroyed. You will also be written up on a Disciplinary Action Report.

NOTE: Inmates who have subscriptions to these types of publications are to ca

APPENDIX G

MARICOPA COUNTY SHERIFF'S OFFICE CLARIFICATION ON ISSUE OF SEXUALLY EXPLICIT MATERIALS (Aug. 6, 1993)

The purpose of this memorandum is to clarify a few issues regarding the possession of sexually explicit material by inmates within the jail system.

Sexually explicit materials are materials that show frontal nudity. Inmates can no longer possess personal photographs, drawings, and magazines and pictorials that show frontal nudity. To ensure that these items are removed from the facilities in an orderly manner, the following actions are to be taken:

- The inmates will be given ten (10) days in which to remove these items from their cells. (Inmate notification attached.) This may be accomplished in the following ways:

  1. Release items to a visitor during a visit.

  2. Mail the items to someone on the outside, at the inmate's expense.

  3. Voluntarily disposing of the items by throwing them in the trash containers in the cell blocks.

  4. If the inmate is unable to eliminate the items by using the above three means, he may re-

quest that we place his items into temporary safekeeping in Property and Evidence.

- If, after ten (10) days, inmates are found to be in possession of sexually explicit materials, these items will be confiscated as Administrative Contraband, and destroyed. The inmate will also be written up on a Disciplinary Action Report.
- Sexually explicit materials that are mailed to the inmates after August 19, 1993 will be returned to sender as UNAUTHORIZED MAIL.

NOTE: Inmates that have subscriptions to these types of publications are to be advised to cancel their subscriptions with the publishers.

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No. 99-1015

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v.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In place of the First Amendment questions posed in the Petition, Respondents urge consideration of the following questions:

1. Does Petitioner lack standing to challenge the jail policy as facially overbroad?

2. Is the Maricopa County jail policy's prohibition against inmate possession of "sexually explicit" materials reasonably related to a legitimate penological interest under *Turner v. Safley*, 482 U.S. 78 (1987)?

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondents Joseph M. Arpaio and Maricopa County respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Ninth Circuit Court of Appeals' *en banc* opinion filed August 17, 1999.

COUNTERSTATEMENT OF THE CASE

A. The Jail Policy Was Adopted in 1993 to Combat Sexual Harassment Directed at Female Detention Officers, to Ensure the Safety of Inmates and Officers, and to Promote the Rehabilitation of Convicted Inmates.

Respondents agree with and incorporate by reference the facts outlined in the Ninth Circuit's *en banc* opinion. (Pet. App. 2a-3a). These facts emphasize: (1) the rea-

sons underlying adoption of the jail policy in 1993; (2) the language of the policy itself; (3) the undisputed fact that adoption of the policy has resulted in a "sharp decrease in the number of problems encountered;" and (4) Petitioner's sole dismay at the policy because of the denial of his subscription to *Playboy* while he was incarcerated in the Maricopa County jail system.

B. The Petition's Characterization of the Decisions Below.

Dissatisfied with the District Court's summary judgment ruling and the Ninth Circuit's ultimate *en banc* opinion, the Petition distorts those rulings by selectively quoting from them while relying heavily on the dissenting opinions and the initial three-judge panel decision. (Pet. at 6-11). While Petitioner's primary motive in doing so is to emphasize the breadth of the policy banning "sexually explicit" materials from the jail, the Petition overlooks key findings and conclusions made by judges who have reviewed the jail policy and rejected Petitioner's constitutional challenge to it.

The greatest fallacy in the Petition is its continued fascination with the theory that the jail policy is unconstitutionally overbroad because it may (theoretically) exclude artistic or scientific publications. The Petition repeatedly stresses the scope of the policy banning all "sexually explict" materials which depict "full frontal nudity," yet never attempts to grapple with footnote 4 of the *en banc* opinion. This footnote emphasizes that prison regulations do not need to pass the "least restrictive alternative test" to withstand constitutional scrutiny. So long as the regulation withstands the *Turner* reasonableness test, it will be deemed constitutional regardless of any overbreadth concerns. (Pet. App. 8a, n.4).[1]

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[1] The Petition also fails to note a key aspect of the evolution of appellate review in this case. After the Ninth Circuit's three-judge

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The Petition also overlooks specific findings of waiver and evidentiary problems in the case. Specifically, the Petition ignores the following:

- The district court's finding that "Mauro has been unable to document a single instance in which a prisoner's request for a copy of *National Geographic*, or any other 'scientific' publication, has been refused because of content" (Pet. App. 9a, n.4);
- The conclusion of the *en banc* court that Petitioner had failed to raise in his briefs the issue of whether the policy was enacted to punish pre-trial detainees (Pet. App. 6a, n.2);
- The conclusion of the *en banc* court that Petitioner had raised issues on appeal (relating to whether reasonable alternatives existed to address the jail officials' concerns) that had not been raised in the district court (Pet. App. 13a, n.6);
- Judge Kleinfeld's dissent acknowledging that potential hearsay problems existed concerning quotations attributed to Respondent Arpaio in a magazine article (Pet. App. 27a-28a).[2]

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panel had found the jail policy substanially overbroad in prohibiting inmate possession of scientific and artistic publications such as *National Geographic*, Respondents filed a petition for rehearing and suggestion for rehearing *en banc*, pointing out the court's error in concluding that "Mauro need not prove substantial overbreadth in a pure speech case." *See, e.g., New York v. Ferber*, 458 U.S. 747 (1982) (substantial overbreadth requirement applies to "pure speech" cases); and *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). After receipt of the petition for rehearing, the three-judge panel took the unusual step of withdrawing this portion of its opinion on September 1, 1998 before even allowing Petitioner Mauro the opportunity to respond. This confession of error by the three-judge panel was followed by the *en banc* opinion's rejection of Petitioner's overbreadth argument.

[2] Beyond hearsay problems associated with this 1995 article, Petitioner has never confronted the reality that the statements at-

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These oversights by Petitioner demonstrate that the record in this case is anything but clear. As found by the district court and the Ninth Circuit, Petitioner has not properly preserved issues in the record. Worse yet, his Petition wholly fails to confront the preliminary issue of whether traditional overbreadth analysis is encompassed within the flexible *Turner* analysis.

REASONS FOR DENYING THE WRIT

I. PETITIONER LACKS STANDING TO MOUNT A FACIAL OVERBREADTH CHALLENGE TO THE JAIL POLICY

What Petitioner labels as the "unprecedented breadth" of the jail policy is not properly before this Court. There are two independent reasons why Petitioner lacks standing to challenge the facial breadth of the jail policy.

First, the Petition fails to even acknowledge the existence of the substantial overbreadth doctrine in traditional First Amendment cases. To enable a court to entertain a facial overbreadth challenge, the First Amendment litigant must demonstrate that the risk of an overbroad application of the statute or policy is both real and substantial. *Broaderick*, 413 U.S. at 615; and *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984) (for a challenged regulation to be deemed substantially overbroad, "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court. . . ."). *See also Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 61

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tributed to Respondent Arpaio were nearly two years *after* the 1993 adoption of the policy. As conceded in the Petition, the reasons behind adoption of the policy were set forth in a contemporaneous memorandum prepared by the sheriff's office in August of 1993. (Pet. at 3)

(1976) ("Since there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance . . . we think this is an inappropriate case in which to adjudicate the hypothetical claims of persons not before the Court.")

To the extent it applies, this First Amendment doctrine compels the conclusion that an inmate who is denied a subscription to *Playboy* magazine (and fails to offer any evidence that other inmates have been denied artistic or scientific publications under the policy) has standing to challenge only the policy's application with respect to the denied *Playboy* subscription.

Second, the overbreadth doctrine is not even applicable in jail/prison cases under the *Turner* analysis. The theoretical exclusion of artistic or scientific journals does not independently render a jail policy unconstitutional, so long as the policy satisfies the *Turner* reasonableness test. *Thornburg v. Abbott*, 490 U.S 401, 414 (1989) ("we prefer the express flexibility of the *Turner* reasonableness standard."); and *Lewis v. Casey*, 116 S. Ct. 2174, 2179-84 (1996) (prisoner seeking to enjoin the operation of a prison policy must demonstrate its unconstitutional application to him rather than to third-parties not before the court). *See also Waterman v. Farmer*, 183 F.3d 208, 212-13 (3rd Cir. 1999) ("the substantial overlap between the *Safley* test and the doctrines of vagueness and overbreadth suggests that the Supreme Court did not intend for those doctrines to apply with independent force in the prison-litigation context.")

Thus, to the extent the Petition challenges the scope of the jail policy and its hypothetical exclusion of artistic and scientific publications, Petitioner lacks standing to as-

sert such an overbreadth challenge. Because the predominant concern of the Petition is the breadth of the jail policy rather than its specific application to the denied *Playboy* subscription of Petitioner, certiorari should be denied on this basis alone.

II. THE WRIT SHOULD BE DENIED BECAUSE THE *EN BANC* OPINION CORRECTLY ANALYZES AND APPLIES THE *TURNER* REASONABLENESS TEST

The Petition seeks to manufacture a conflict that does not exist. Citing to the *Turner* and *Thornburgh* decisions of this Court, the Petition contends that the *en banc* opinion's "interpretation of the reasonableness test conflicts with *Turner*." (Pet. at 24). It does not. The *Turner* reasonableness test is, as its name suggests, case-specific. The Ninth Circuit's *en banc* opinion did not proclaim any new principles of law or seek to undermine *Turner* in any way. Instead, the opinion simply applied the *Turner* reasonableness analysis to a jail policy based on the record before the court. The district court found the jail policy reasonably related to Maricopa County's legitimate penological interests and the Ninth Circuit affirmed that ruling on appeal.

Petitioner's chief complaint appears to be that "none of the safeguards that comforted this Court in *Thornburgh* is present here." (Pet. at 19). Petitioner emphasizes that the Maricopa policy does not allow any exceptions similar to the Bureau of Prisons' policy before this Court in *Thornburgh*. Petitioner's reading of *Thornburgh* is that prison authorities must, at a minimum, either "provide individualized consideration of requested materials so as not needlessly to exclude benign materials that are otherwise protected by the First Amendment, or narrow the category of restricted materials to achieve the same results." (Pet. at 20). *Thornburgh* does not establish the

outer limits of what prison authorities may do in regulating the First Amendment rights of inmates in their custody.

First, the Bureau's policy challenged in *Thornburgh* was brought in the context of a class action in which 46 publications had been banned by operation of the policy. Petitioner Mauro, by contrast, stands alone (so far as the record shows) in his desire to obtain a *Playboy* subscription and failed to present any evidence that inmates have ever been denied artistic and scientific publications.

Second, while the safeguards alluded to by Petitioner in the *Thornburgh* case may have "comforted" this Court in reaching its conclusion, there is nothing in the *Thornburgh* opinion to suggest that such safeguards are constitutionally compelled. Indeed, the same Federal Bureau of Prisons whose regulations withstood scrutiny in the 1989 *Thornburgh* decision changed its policies in 1996, making them more restrictive by banning certain "sexually explicit" materials. This more restrictive policy of the Bureau was recently upheld by a federal appeals court in *Amatel v. Reno*, 156 F.3d 192 (D.C. Cir. 1998), *cert. denied*, 119 S. Ct. 2392 (1999).

Unlike the prison authorities in *Thornburgh*, the record here establishes that jail officials were facing (among other things) a sexual harassment problem in 1993 that had become increasingly difficult to avoid without the adoption of measures to curb the flow of pornography to inmates. Female detention officers on their work shifts had been sexually harassed by male inmates with the inmates using the sexually explicit pictorials to fuel their fantasies. Adoption of the policy by state jail authorities was precisely the type of "innovative solution[] to the intractable problem[] of prison administration" for which Article III deference is required. *Turner*, 482 U.S. at 89. Maricopa jail officials were not required to adopt the "least restric-

tive alternative" as the only acceptable method for solving the problem at hand.[3]

The *Turner-Thornburgh* test is case-specific, involving questions of whether the particular prison or jail policy is reasonably related to legitimate penological interests. Focusing on the rights of Petitioner, the Ninth Circuit's *en* banc opinion correctly analyzed the *Turner* issue and upheld the policy as reasonably related to Maricopa County's legitimate interests. The Ninth Circuit's opinion faithfully adheres to this Court's *Turner-Thornburgh* test and does not conflict with any other circuit opinions.

The Petition, however, contends that the Ninth Circuit is now in conflict with decisions from the Sixth, Seventh, and Eighth Circuits. The only "conflict" identified by the Petition is that the *en banc* court shirked its "obligation to weigh all relevant factors. . . ." (Pet. at 26). The circuit opinions cited in the Petition to support this asserted conflict do not even involve sexually explicit materials but rather prison regulations infringing on inmate religious freedoms or foreign language rights. *See generally Salaam v. Lockhart*, 905 F.2d 1168 (8th Cir. 1990) *cert. denied*, 498 U.S. 1026 (1991); *Kikumura v. Turner*, 28 F.3d 593 (7th Cir. 1994), *cert. denied*, 514 U.S. 1005 (1995); and *Whitney v. Brown*, 882 F.2d 1068 (6th Cir. 1989). Simply because the jail policy here passed the *Turner test*

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[3] As emphasized throughout the proceedings below, courts have found the existence of a hostile work environment where pictures of nude women and sexual slurs abound. *See EEOC Compliance Manual* § 614, ¶ 3114(C)(1) at 3274 (1990). *See also Robinson v. Jacksonville Ship Yards, Inc.*, 760 F. Supp. 1486 (M.D. Florida 1991); *Sanchez v. City of Miami Beach*, 720 F. Supp. 974, 977 (S.D. Florida 1989). Moreover, 29 C.F.R. § 1604.11(e) provides that an "employer may . . . be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate action."

while other (completely unrelated) prison policies have flunked the *Turner test* does nothing to present a conflict in circuit authority. The *Turner* test is preferred for its flexibility; it is neither designed for nor capable of providing the type of mechanical application demanded by Petitioner.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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REPLY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Respondents' Brief in Opposition does not attempt to defend the indefensible. The Opposition does not dispute that the Maricopa County Sheriff's Office ("MCSO") policy prohibiting and punishing the possession of materials containing depictions of nudity of any kind—invoked to deny petitioner Jonathan D. Mauro's request for a *Playboy* subscription—is "of unprecedented breadth." A. 20a (B. Fletcher, J., dissenting). The Opposition does not attempt to explain why Respondents, unlike other prison or jail administrators around the nation, chose not to permit any exceptions, even for medical or educational depictions, to

their bright-line rule.[1] Nor does the Opposition dispute that *all* the safeguards on which this Court relied in *Thornburgh v. Abbott*, 490 U.S. 401 (1989), to uphold the facial validity of subject-matter prohibitions on incoming publications are missing from Respondents' policy.

And, rather than defend an *en banc* opinion previously described by Respondents as "addressing important constitutional questions in the jail/ prison setting,"[2] the Opposition proceeds instead to all but ignore those important questions in favor of attacking straw-man arguments unrelated to the suitability of this case for review.

I.

The Opposition barely addresses one of the two questions presented in the certiorari petition: whether, under *Thornburgh*, the First and Fourteenth Amendments can tolerate a jail system prohibiting the possession of expressive materials based on subject matter with *no* individualized consideration of the content of any requested material or the circumstances in which a request is made, and *no* high-level exercise of discretion in considering such a request.

The Opposition does not dispute that since and including *Turner v. Safley*, 482 U.S. 78 (1987), *Thornburgh* stands as the only case in which this Court has addressed how *Turner*'s "reasonableness" standard should be applied to regulations that prohibit expressive materials specifically because of the impact the materials' subject matter might

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[1] Respondents erroneously describe their own policy as banning "'full frontal nudity.'" Opp. 2. The policy, in fact, bans "frontal nudity," which the Deputy Chief testified includes pictures of bare-chested males and females. *See* Pet. A21a n.1, A73a.

[2] Letter from D. Struck to Clerk, U.S. Sup. Ct. (Jan. 5, 2000) (requesting 30-day extension of time).

have on inmates' conduct. Recognizing that outside the prison context, such prohibitions would raise "grave First Amendment concerns," 490 U.S. at 407, the *Thornburgh* Court proceeded with caution in evaluating the Bureau of Prisons regulations before it, upholding their facial validity "comforted by" a number of critical safeguards, *id.* at 416. *See id.* (noting "the individualized nature of the [exclusionary] determinations"); *id.* (observing that "no publication may be excluded unless the warden himself makes the determination" that it is detrimental to security, good order, or discipline); *id.* at 416-17 (noting the requirement that the warden's determination be based on "the conditions prevailing at the institution at the time"); *id.* at 417 (endorsing the regulations' "prohibition against establishing an excluded list of publications").

Nor does the Opposition dispute that every one of these safeguards is missing from the MCSO policy, which, in inflexibly banning depictions of nudity of any kind, requires results that the D.C. Circuit, upholding a considerably narrower ban, called "bizarre" and "all but impossible to believe." *Amatel v. Reno*, 156 F.3d 192, 202 (D.C. Cir. 1998), *cert. denied*, 119 S. Ct. 2392 (1999).

In response, the Opposition merely argues that "*Thornburgh* does not establish the outer limits of what prison authorities may do in regulating the First Amendment rights of inmates." Opp. 6-7. *See also id.* 7 ("there is nothing in the *Thornburgh* opinion to suggest that such safeguards are constitutionally compelled"). But this argument, far from disposing of any questions, merely raises one: If the Opposition is correct, and *Thornburgh* does not establish the "outer limits" of jail or prison administrators' power to prohibit and punish the possession of expressive materials based on subject matter, then what are the outer limits, and can the "unprecedented" and "all but impossible to believe" policy imposed by the MCSO possibly fall within them?

Review is appropriate to determine the important constitutional question of what safeguards are indeed necessary to protect inmates' First Amendment rights to be free from rules that unreasonably prohibit and punish based on the subject matter of speech, an issue that the Opposition concedes is at least left open by *Thornburgh*.

II.

The principal straw man erected by the Opposition is the erroneous contention that the certiorari petition somehow seeks application of "traditional overbreadth analysis," Opp. 4, in place of the "reasonableness" test required by *Turner* and *Thornburgh*. But the petition nowhere suggests that any test other than the *Turner* "reasonableness" standard is required. Expressly relying on this standard, the petition argues that, "[b]y *rejecting* the safeguards set forth in *Turner* and *Thornburgh* that 'channel[] the reasonableness inquiry,' the *en banc* Ninth Circuit court" inappropriately diminished the scrutiny applied to the actions of prison administrators. Pet. 13 (quoting *Thornburgh*, 490 U.S. at 414) (emphasis added).

The petition does not argue that "traditional overbreadth analysis" should be applied independent of *Turner*'s four-prong test. But it cannot seriously be maintained that overbreadth analysis plays no part in the *Turner* test. As the Third Circuit observed in *Waterman v. Farmer*, 183 F.3d 208 (3d Cir. 1999), there is "substantial overlap between the [*Turner*] test and the doctrine[] of . . . overbreadth," and in applying the *Turner* test, therefore, courts "take[] into account many of the same factors considered under the doctrine[] of overbreadth." *Id.* at 213 & n.6.

Thus, in contending that an inmate plaintiff under *Turner* "lacks standing to challenge the facial breadth" of a

jail policy, Opp. 4, 5,[3] the Opposition makes an argument not even adopted by the *en banc* court, because it is flatly at odds with this Court's precedent. In both *Turner* and *Thornburgh*, this Court entertained facial challenges to prison regulations. *See Turner*, 482 U.S. at 78 ("We conclude . . . that the Missouri marriage regulation is facially invalid"); *Thornburgh*, 490 U.S. at 419 ("we hold that *Turner*'s reasonableness standard is to be applied to the regulations at issue in this case, and that those regulations are facially valid under that standard"). Indeed, in *Turner*, this Court granted relief to female inmates in large part based on facial overbreadth grounds. The prison regulation in that case applied to burden the rights of both female and male inmates to marry. The Court noted, *inter alia*, that since none of the purported justifications for the regulation supported its application to male inmates, the regulation "sweeps much more broadly than can be explained by petitioners' penological objectives," 482 U.S. at 98, and was therefore invalid on its face as to both male and female inmates.[4]

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[3] *See Board of Trustees v. Fox*, 492 U.S. 469, 482-83 (1989) (explaining that the overbreadth doctrine permits a plaintiff to challenge a statute or rule "facially" rather than "as applied" to his own conduct); *Los Angles Police Dep't v. United Reporting Publishing Corp.*, 120 S. Ct. 483, 489 (1999) (discussing "facial overbreadth adjudication") (quotation and brackets omitted).

[4] If the Opposition, which cites a constitutional standing case, *Lewis v. Casey*, 518 U.S. 343 (1996), also intends to suggest that petitioner "lacks standing" in a jurisdictional sense to challenge the MCSO policy on its face, Opp. 4, this would also be incorrect. There is no dispute that petitioner—who was harmed when the policy was applied to deny his request for a *Playboy* subscription—has suffered an "actual injury" for standing purposes. 518 U.S. at 356. *See* R. Rotunda, *et al.*, *Treatise on Constitutional Law* § 20.8, at 270 (3d ed. 1999) (cautioning against "confus[ing] standing and first amendment issues" when engaging in overbreadth analysis).

No court, including the *en banc* court, has adopted the rule against facial challenges that Respondents would propose, and Respondents otherwise cannot seriously dispute that their "astonishingly broad," A. 22a (B. Fletcher, J., dissenting), "unprecedented," *id.* A. 20a, and "all but impossible to believe," *Amatel*, 156 F.3d at 202, no-exceptions ban on nudity "sweeps much more broadly" than can be explained by any legitimate objective, and is therefore invalid on its face. 482 U.S. at 98.[5]

III.

The Opposition's bare assertion that "[t]he Ninth Circuit's *en banc* opinion did not proclaim any new principles of law or seek to undermine *Turner* in any way," Opp. 6, rings especially hollow in light of the conclusion reached by the Ninth Circuit panel in *Frost v. Symington*, 197 F.3d 348 (9th Cir. 1999), that, quite to the contrary, "[i]n very clear and broad language, *Mauro* dramatically diminishes the level of scrutiny that courts are to apply to the decisions of prison administrators," *id.* at 355. The certiorari petition cites *Frost* in three places, Pet. 12, 21, 24. The Opposition's response to these citations—silence—speaks for itself.

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[5] *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), does not provide support for Respondents' overbreadth argument. The Opposition quotes *Young* as holding that in that case it was inappropriate to adjudicate the claims of persons not before the Court. *See* Opp. 4-5. But, through the use of ellipses, the Opposition removes the middle of the quotation, in which the Court explains that a key reason it would not entertain a facial vagueness challenge to the ordinances at issue was that "the limited amount of uncertainty in the ordinances is easily susceptible of a narrowing construction," thus not impermissibly burdening First Amendment rights. 427 U.S. at 61. Here, by contrast, Respondents have never urged a limiting construction on their policy, and no court has found one possible.

Rather than defend the *en banc* court's departure from *Turner*, the Opposition pretends that the only conflict is whether the Ninth Circuit "shirked" an obligation to weigh all relevant factors. Opp. 8. But the *en banc* court did not merely overlook or neglect to apply aspects of the *Turner* test. It explicitly held, using italics to emphasize its point, that it would not even *consider* whether a jail policy was an "exaggerated response" to a perceived problem unless, as a preliminary matter, "an *inmate* claimant can point to an alternative." A. 12a (emphasis in original; quotation omitted). *See also* A. 12a-13a ("[i]t is incumbent upon the *prisoners* to point to an alternative" before a court would consider whether a policy is an exaggerated response) (emphasis in original; quotation omitted). It is this holding, and the *en banc* court's "clear[ly] and broad[ly]" stated decision to diminish the applicable level of scrutiny, *Frost*, 197 F.3d at 355, that conflict with *Turner* and with decisions of the Sixth, Seventh, and Eighth Circuits. *See* Pet. 22-28.[6]

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[6] Respondents' procedural arguments against granting review, *see* Opp. 3-4, do not withstand even minimal scrutiny. Most notably, after invoking the terms "waiver" and "evidentiary problems," *id.* 3, the Opposition does not even attempt to state how (or even whether) such "problems" have any impact on the suitability of this case for review. Perhaps the starkest example is the Opposition's heated complaints about the admissibility of a magazine interview with Respondent Arpaio, *id.* 3 & n.2, despite the fact that the certiorari petition does not even mention that article. Similarly, the Opposition cites a footnote in the *en banc* court's decision to suggest that an argument has been waived, Opp. 3, yet fails to disclose that the argument in question—that *Bell v. Wolfish*, 441 U.S. 520 (1979), rather than *Turner* or *Thornburgh*, should supply the legal standard—was raised by a dissenting judge, not by petitioner, and is not advanced in the petition. *See* A6a n.2 ("Judge Kleinfeld maintains that there is a genuine issue of material fact regarding whether the jail's policy of excluding sexually explicit materials was imposed for the purpose of punishing pretrial detainees. This issue was *not raised by the parties* . . . .") (emphasis added).

CONCLUSION

For the reasons stated herein and in the petition, certiorari should be granted.

Respectfully submitted,

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